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THE NATURE AND SCOPE OF THE CONSTRUCTIVE TRUST IN COMMON LAW CANADA

by

© JOHN LANGWORTHY DEWAR

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled THE NATURE AND SCOPE OF THE CONSTRUCTIVE TRUST IN COMMON LAW CANADA submitted by JOHN LANGWORTHY DEWAR in partial fulfilment of the requirements for the degree of Master of Laws.

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.....
Supervisor

.....

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Date 7th March 1975

TO MY PARENTS

ABSTRACT

In view of the recent judgment of Laskin J. (dissenting) in Murdoch v. Murdoch, which suggests that the constructive trust is an equitable remedy based upon the principle of unjust enrichment, the time appears to be ripe for a re-examination of this concept in the Canadian context.

To date, the major influence upon the development of the constructive trust in Canada has come from English law. For historical reasons, English law has treated the constructive trust as a substantive institution analogous to the express trust, and not as a remedy. But because the constructive trust has been employed in a diversity of situations, and a number of different reasons for its imposition have been given, the institutional analogy has proved inadequate, and has required modification. The predominant view of the constructive trust in both England and Canada today, therefore, is that it is primarily institutional, but that in certain situations it serves a remedial function.

By way of contrast with English law, American law has long regarded the constructive trust as an equitable remedy based upon the principle of unjust enrichment, and not as a type of trust. The constructive trust bears no more relation to the express trust, the Americans would say, than a quasi-contractual obligation bears to a contract. There are a number of advantages to the American approach, not the least of which is that, notwithstanding the difficulties inherent in defining the elements of unjust enrichment, the role of the constructive trust becomes immediately more comprehensible.

Even before the decision of Laskin J. in the Murdoch case, a number of Canadian decisions had explained the constructive trust in terms of the American approach, though they do not appear to have made a significant impact on the development of the law. What the judgment of Laskin J. challenges us to do is compare the relative advantages and disadvantages of the English and American approaches, and make a choice. To that task, this thesis is devoted.

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INTRODUCTION

This thesis will be devoted to a study of the nature and scope of the constructive trust in common law Canada.

Chapter One will outline the problem which presently exists in the common law jurisdictions of Canada. To date, the Canadian courts have taken an ambiguous position on whether to follow the English approach to the constructive trust as a substantive legal institution analogous to the express trust, or the American approach to the constructive trust as a remedial device which is imposed in order to prevent unjust enrichment.

In Chapter Two the traditional English approach will be followed, and reference made to a number of Canadian cases which have been decided in accordance with this approach.

Chapter Three will contain a discussion of those English and Canadian decisions which have emphasized the remedial nature of the constructive trust.

Finally, in Chapter Four, a comparison will be made of the relative merits of the traditional English approach, and the "remedial" approach; and certain recommendations for the future will be made.

CHAPTER ONE

THE NATURE OF THE CONSTRUCTIVE TRUST

I. THE PROBLEM OUTLINED

The development of the constructive trust in common law Canada has been subject to two major, competing influences. On the one hand, English legal doctrines and decisions have always had, and continue to have, a pervasive influence on Canadian legal thought.[1] On the other hand, Canadian judges and writers are adopting with increasing frequency the suggestion of Oliver Mowat that "in Canada we must find advantage and interest in examining [American] decisions and writings far beyond what is the case in England [because] our local circumstances are more nearly like those of the people of the United States."[2] Since on the matter of the constructive trust the English and American views are divergent, and since, to date, neither view has been clearly preferred by the Canadian courts, the nature and scope of the constructive trust remains an unsettled question in Canadian law.

Essentially, the problem is this: is the constructive trust properly to be regarded as a substantive legal institution, analogous to the express trust (the traditional English approach); or is it rather a general equitable remedy which may be imposed wherever necessary in order to prevent unjust enrichment (the American approach)?

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[1] Laskin, The British Tradition in Canadian Law 49 (1969).

[2] Mowat, Observations on the Use and Value of American Reports in Reference to Canadian Jurisprudence (1857) 3 U.C.L.J. (O.S.) 3, cited in Laskin, id. at 102.

"[U]ntil this problem is solved," wrote Professor D. W. M. Waters some ten years ago, "the constructive trust is likely to remain a vague, relatively insignificant concept in the courts and an enigma, no less, to the enquiring minds of the tutorial class."[3] Bearing in mind that admonition, and the developments which have taken place in the case law since that time, it is submitted that the moment is ripe for an examination of this matter in the Canadian context.

In this Chapter an attempt will be made merely to outline the law in its present state of development in the English, American and Canadian jurisdictions, leaving to a later stage an evaluation of the different approaches with a view to recommending a preferred approach for Canadian law.

II. THE ENGLISH POSITION

A. Definition

In English law the constructive trust has been traditionally regarded as a substantive institution, i.e., a type of trust. The explanation for this is historical. From a very early stage in its development of the constructive trust concept it was the common practice of the Court of Chancery to analogize it to the express

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[3] Waters, The Constructive Trust 9 (1964).

trust.[4] As a result of this practice, which is still carried on in the textbooks,[5] the constructive trust and the express trust came to be regarded merely as different members of the same family. And, indeed, an obvious point of similarity does exist, for with both the express

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[4] Waters, Id. describes the process in some detail. At p. 39 he concludes: "The truth of the matter is that the constructive trust was coined as a term because Chancery was invited to adjudicate in disputes where the relationship of the parties was rooted in the common law, and upon which Chancery imposed the language of trust. The language of trust came naturally, moreover, when Chancery was invited to impose the rudiments of trust obligation upon persons who were not trustees by express or implied creation. But, unlike the doctrine of Moses v. Macferlan, [(1760) 2 Burr. 1005, 1 Wm. Bl. 219], there was never a theme behind the use of the constructive trust by Chancery. It was never any more than a convenient and available language medium through which for the Chancery mind the obligations of parties might be expressed or determined. Whereas the divided jurisdictions of law and Equity gave rise to the ready use of trust language where common law language might equally well have served, the dominance of the trust in all Chancery thinking after the 17th century brought about the process of ready thinking by analogy. In short, a separated Court of Chancery gave us the term constructive trust, and the application of the term by analogy with the express trust was Chancery's practice from the beginning."

Professor Keeton, while accepting Professor Waters' major hypothesis, has taken issue with the supposition that the constructive trust was initially or primarily concerned with relationships which were "rooted in the common law." Referring to the work of Dr. Yale, [Yale II Nottingham's Chancery Cases 101, 124 et seq.], he notes that the constructive trust as a device to control erring trustees was already firmly established in Lord Nottingham's day, and suggests that it was this relationship which Lord Nottingham had in mind when in Cook v. Fountain (1676) 3 Swanston App. 585, 586 he referred to ". . . trusts, which are raised or created by act or construction of law." See Keeton, The Law of Trusts 194 (9th ed., 1967).

[5] See e.g. Goff and Jones, The Law of Restitution 37 (1966), Hanbury, Modern Equity 219 (9th ed. Maudsley 1969), Keeton, The Law of Trusts 194 (9th ed. 1967), Nathan and Marshall, A Casebook on Trusts 267 (5th ed. 1967). The writers limit the analogy by pointing out that the duties and responsibilities of a constructive trustee are not in every case coextensive with those of an express trustee, and furthermore, that constructive trustees as a class do not have the same obligations.

trust and the constructive trust the court is concerned with situations where title to property is in one person who, however, is regarded in equity as holding it for the benefit of another.

In emphasizing this point of similarity, however, attention is directed away from the fact that there is a fundamental point of distinction between the express trust and the constructive trust. This matter is brought into focus when one considers the question why, in a particular situation, equity requires the person in whom the legal title to the property is vested to hold it for the benefit of another. In the case of the express trust the answer is clear: a trust arises because of the manifestation of intention on the part of the settlor that it should do so. In the case of the constructive trust, however, English law is not able to give a satisfactory answer. By way of contrast with the express trust it is, of course, well established that the constructive trust is imposed by operation of law irrespective of the intentions of the parties; but if one attempts to look beyond that accepted characteristic to search for a clear explanation of what principle underlies the imposition of the constructive trust, one is forced to the disappointing conclusion that:[6]

> . . . English law . . . affords relief, on the ground of the constructive trust, in specific situations, the limits of which are not fixed by reference to any satisfactory conceptual theory.

From time to time, efforts have been made to suggest a theory which underlies all the constructive trust situations and provides a

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[6]Nathan and Marshall, A Casebook on Trusts 267 (5th ed. 1967).

unifying theme. Thus, Messrs. Goff and Jones in their work on Restitution,[7] while accepting the notion of the constructive trust as an institution,[8] have sought to explain many of the constructive trust situations on the basis of a theory of unjust enrichment. Another view, which was put forward by Edmund Davies L.J. in the case of Carl Zeiss Stiftung v. Herbert Smith (No. 2)[9] is that the concept of a "want of probity" in the person upon whom the constructive trust is imposed provides "a useful touchstone in considering circumstances said to give rise to constructive trusts. . . ."[10] However, no general acknowledgement of either of these theories is evident in the cases.[11]

These factors obviously make it difficult to define a constructive trust. Professor Maudsley has suggested that "[w]e may . . . think of constructive trusts as existing wherever the legal title is in one person, but the beneficial entitlement is, by operation of the rules of equity and independently of the intention of the parties, in another";[12] and, without resorting to an enumeration of specific situations, we can take the matter no further than that.

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[7] Goff and Jones, The Law of Restitution (1966). See also Lord Wright, Legal Essays and Addresses 7 (1939).

[8] Id. at 36-38.

[9] [1969] 2 Ch. 276 (C.A.).

[10] Id. at 300-301.

[11] Oakley, Has the Constructive Trust Become a General Equitable Remedy? (1973) 26 Current Legal Problems 17 at 20.

[12] Maudsley, Proprietary Remedies for the Recovery of Money (1959) 75 L.Q. Rev. 234 at 236.

B. Criticism of the English Position

Professor D. W. M. Waters, in his book The Constructive Trust,[13] has argued that "the English law of constructive trusts is in a cul-de-sac of legal reasoning."[14] He points out that the term "constructive trust" is used in English law to link together a number of disparate situations merely on the basis that the obligations imposed by law in these situations may in some way be likened to the obligations which are imposed upon an express trustee:[15]

> The vendor and the purchaser, the mortgagor and the mortgagee, the individual who acquires by fraud, the fiduciary, and then, at the other end of the scale, the secret trustee and the executor/trustee de son tort are all brought under the broad umbrella of the constructive trust, not, it should be noted, with any theme in mind, but because at different times and for different reasons each of these persons, because of his obligations, has been analogized with the express trustee.

Furthermore, he suggests that the mere fact of being able to draw these analogies is not a sufficient basis for classifying the constructive trust along with the express trust as a substantive legal institution, and, in fact, the true basis of the trust institution disappears when the element of intention is removed.[16] Waters concludes

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[13] Waters, The Constructive Trust (1964).

[14] Id. at 3.

[15] Id.

[16] Id. at 15.

that the constructive trust can be usefully understood only as a remedy which is based on a theory of unjust enrichment, and that "a new attitude towards the precedents"[17] is required so that this change may be effected. He warns that until the constructive trust is given a satisfactory conceptual basis from which to develop it is likely to remain an "academic backwater"[18] in English law.

C. Other Views

Other writers[19] have taken a less radical approach. They have suggested that the constructive trust should be seen as having both an "institutional" and a "remedial" aspect; but, while acknowledging that the remedial aspect has been insufficiently recognized, and should, perhaps, be identified by a separate name,[20] they do not suggest that the institutional aspect can be discarded.[21]

However, these writers disagree upon which situations should properly be considered institutional, and which remedial. Professor

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[17] Id. at 43. See further infra.

[18] Id. at 28.

[19] See e.g. Maudsley, Proprietary Remedies for the Recovery of Money (1959) 75 L.Q. Rev. 234 at 236-237, Maudsley, Restitution in England (1966) 19 Vanderbilt L. Rev. 1123 at 1140-1141, Sealy, Some Principles of Fiduciary Obligation [1963] Camb. L.J. 119 at 119-124. (The background to this article is found in Sealy, Fiduciary Relationships [1962] Camb. L.J. 69).

[20] Maudsley suggests "constructive quasi-trust": see (1959) 75 L.Q. Rev. 234 at 237. See also Lord Wright, Legal Essays and Addresses 7 (1939).

[21] In fact, Maudsley maintains that "the constructive trust as an institution cannot be discarded": see (1966) 19 Vanderbilt L. Rev. 1123 at 1140.

Maudsley, for example, sees the constructive trust as institutional in those situations only where an express or implied trust affects the property which has been wrongfully obtained, and the obligations arising under that trust are imposed by law upon the transferee of the property. He includes under this head the following situations: (1) renewal by a trustee of a lease in his own name,[22] (2) making of an unauthorized profit for himself by a trustee or other fiduciary during the course of administration of the trust,[23] (3) fraudulent acquisition of trust property by a purchaser with notice,[24] (4) secret trusts,[25] and (5) mutual wills.[26] On the other hand, Maudsley regards the constructive trust as remedial in those situations where no express or implied trust exists, and the court is concerned solely with the property of the plaintiff being wrongly in the hands of the defendant.[27] On the authority of Lister v. Stubbs,[28] he suggests that the remedial constructive trust does not extend to those situations where the plaintiff is claiming that money or property in the hands of the defendant

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[22]Citing Keech v. Sandford (1726) Sel. Cas. Ch. 61.

[23]Citing Phipps v. Boardman [1967] 2 A.C. 46 (H.L.).

[24]Citing Barnes v. Addy (1874) 9 Ch. App. 244, Nelson v. Larholt [1948] 1 K.B. 339.

[25]Citing McCormick v. Grogan (1869) L.R. 4 H.L. 82.

[26]Citing Re Green [1951] Ch. 148.

[27]Maudsley, Proprietary Remedies for the Recovery of Money (1959) 75 L.Q. Rev. 234 at 237.

[28](1890) 45 Ch. D. 1.

ought to be his, (claim in personam), as opposed to the property being his, (claim in rem);[29] and so he would exclude from the realm of the constructive trust those cases involving the taking of bribes or secret commissions.

By comparison with Professor Maudsley, Professor Sealy gives the institutional constructive trust a much broader scope. In his view, the constructive trust is institutional not only when a breach of an express or implied trust has occurred, but in any situation where the plaintiff is seeking to recover from another property in which he (the plaintiff) has a proprietary interest, or is suing in personam a holder with notice of that interest.[30] He regards the remedial constructive trust as coming into play only in those cases where the plaintiff is claiming that money or property in the hands of the defendant ought to be his, i.e., where the plaintiff's claim is based "not on ownership in equity but on obligation in equity":[31]

> In such cases, the plaintiff has either effectively ceased to be or never has been beneficially entitled to the property. It is held adversely to him by the defendant, who may alienate or squander it as he pleases, and who may plead the Statutes of Limitation. The plaintiff's right is in no sense a jus in rem; it may be described as a jus ad rem, i.e., a claim in personam

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[29] Maudsley, Proprietary Remedies for the Recovery of Money (1959) 75 L.Q. Rev. 234 at 245.

[30] Sealy, Some Principles of Fiduciary Obligation [1963] Camb. L.J. 119 at 119-122.

[31] Id. at 123. Footnotes omitted.

> to a specific res. The right is available only against the defendant; the plaintiff cannot follow the property into other hands; indeed, he cannot even restrain the defendant from dealing with it. In the case of a money claim, the obligation is in the nature of an equitable debt, and not a trust. [Citing inter alia Lister v. Stubbs (1890) 45 Ch. D. 1.]
>
> There is, however, a possible source of confusion in the procedure followed by the court: as a first step in granting relief, it will decree the defendant to be a trustee of the property for the benefit of the plaintiff. . . . This "constructive" trust is purely a "remedial device". The court does not recognize the existence of a trust-relationship already constituted, but creates one where there previously was none.

Professor Waters has used this disagreement among his colleagues to reinforce his position that a new approach is required in English law. He points to American law, which holds that "(a) putting right a breach of express or implied trust, (b) claiming one's own proprietary interest, and (c) claiming that property ought to be one's own, together make up the constructive trust, a trust which is always remedial,"[32] and asserts that if the concept of a remedial constructive trust were adopted in English law, and unjust enrichment were acknowledged to be the principle underlying both the claim in rem and the claim in personam, then the whole basis of the Maudsley-Sealy disagreement would disappear. Nevertheless, until very recently at least,[33]

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[32] Waters, The Constructive Trust 340 (1964).

[33] Cf. Oakley, Has the Constructive Trust Become a General Equitable Remedy? (1973) 26 Current Legal Problems 17. See also, Chapter Three infra.

the idea of the institutional constructive trust has prevailed.[34]

The preceding discussion, then, should give some idea of the scope of the disagreement in English law. Despite the antiquity of the constructive trust concept, which has a history dating back beyond Lord Nottingham's time, there is no definitive answer to the question: what is a constructive trust? The matter is further complicated by the importance which is attached to the fiduciary relationship, a matter to which we shall now turn.

D. Importance of the Fiduciary Relationship

It was largely as a result of the practice of analogizing the express trust and the constructive trust that the fiduciary relationship assumed such a central position in constructive trust thinking.[35] Thus, many writers[36] have asserted that a pre-existing fiduciary relationship is a sine qua non to the imposition of a constructive trust, and accordingly have viewed the doctrine of constructive trusts as being exclusively concerned with the rule in Keech v. Sandford.[37] Hence the comment

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[34] See e.g. Goff and Jones, The Law of Restitution 37-38 (1966), Snell, Principles of Equity 186 (27th ed. Megarry and Baker 1973), Maudsley, Restitution in England (1966) 19 Vanderbilt L. Rev. 1123 at 1141.

[35] Waters, The Constructive Trust 4, 17-19, 33 et seq. (1964).

[36] See e.g. Lewin, The Law of Trusts 141 (16th ed. Mowbray 1964), White and Tudor II, Leading Cases in Equity 706 (8th ed. Whittaker 1912), Yale II, Nottingham's Chancery Cases 124 (1961).

[37] (1726) Sel. Cas. Ch. 61. The phrase "the rule in Keech v. Sandford" is used in the text to indicate the rule that a fiduciary may not profit from his fiduciary position. Keech v. Sandford may also be cited as authority for the more limited rule applicable to trustees

[Continued on next page.]

of the noted American author, Scott, that "in the English books they play up the Romford Market case [i.e., Keech v. Sandford] as though it were the constructive trust."[38] While this approach is no longer generally favoured,[39] it remains true that "the fiduciary relationship is clearly wed to the constructive trust over the whole, or little short of the whole,[40] of the trust's operation in English law."[41] That fact has served in turn to reinforce the view of the constructive trust as a substantive legal institution, since the fiduciary relationship is seen as a common factor which ties the constructive trust situations together.

This preoccupation with the fiduciary relationship has created difficulties in the analysis of the constructive trust concept. To begin with, the courts have experienced the greatest difficulty in defining a fiduciary,[42] and it is probably correct to say that no

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[Continued from page 12.]
and other persons with limited or partial interests in property whereby in certain circumstances renewed or additional rights obtained by any such person are deemed to be an accretion to the original property, with the result that he is allowed no greater rights in regard to the accretion than he has or had in the property originally held. See Sealy, Fiduciary Relationships [1962] Camb. L.J. 69 at 77.

[38]Scott, Constructive Trusts (1955) 71 L.Q. Rev. 39 at 47.

[39]See Waters, The Constructive Trust 28-43 (1964).

[40]The qualification is directed to the cases of actual fraud and the contract of sale, and possibly also mortgage: Id. at 26 n. 4.

[41]Id. at 33.

[42]Probably the most often cited comment is that of Fry J. in Ex Parte Dale & Co. (1879) 11 Ch. D. 772 at 778, where he said that a fiduciary relationship "is one in respect of which if a wrong arise, the same remedy exists against the wrong-doer on behalf of the principal as would exist against a trustee on behalf of the cestui que trust." This statement identifies a particular characteristic of a fiduciary relationship, but hardly qualifies as a definition.

satisfactory definition has ever been formulated, or, indeed, is possible; although several classifications have been attempted by the writers.[43] Because of its nature, the content of the fiduciary relationship can be expressed only in very general terms until a specific case is presented for consideration:[44]

> The word "fiduciary", we find, is not definitive of a single class of relationships to which a fixed set of rules and principles apply. Each equitable remedy is available only in a limited number of fiduciary situations; and the mere statement that John is in a fiduciary relationship towards me means no more than that in some respects his position is trustee-like; it does not warrant the inference that any particular fiduciary principle or remedy can be applied.

Furthermore, the question of what circumstances will suffice to give rise to a fiduciary relationship has always been regarded as a question of fact for the court to decide:[45]

> The result, as might be expected, is that both judges and law reporters have left many questions as to individual cases which cannot now be answered. Very often it is not clear what total set of facts the court had to consider before coming to the conclusion that the particular defendant was or was not a fiduciary.

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[43] See e.g. Sealy, Fiduciary Relationships [1962] Camb. L.J. 69, Sealy, Some Principles of Fiduciary Obligation [1963] Camb. L.J. 119, Waters, The Constructive Trust 68 et seq., 339-343 (1964).

[44] Sealy, Fiduciary Relationships [1962] Camb. L.J. 69 at 73. See also Re Coomber: Coomber v. Coomber [1911] 1 Ch. 723 at 728, per Fletcher Moulton L.J.

[45] Waters, The Constructive Trust 242 (1964).

Accordingly, given the importance of the fiduciary relationship to the constructive trust, it will be appreciated that the vagueness of the former concept necessarily enhances the difficulty of coming to grips with the latter.

Another criticism which has been made by proponents of the remedial constructive trust is that the emphasis on the fiduciary relationship has played a large part in impeding the development of the constructive trust along remedial lines, since in determining whether a constructive trust should be imposed the courts have become accustomed to placing primary significance on the abuse of a relationship, rather than upon the wrongful nature of the act or event whereby the property was acquired.[46] By way of contrast, it is the latter factor which is of major importance in American law, where the fiduciary relationship is seen "not [as] a beginning point of restitution, it is merely a proximity of the parties which makes an event, otherwise not of sufficient gravity to lead to a decree, of heightened significance and therefore comparable with the events which without the special relationship would justify a decree."[47] It is this matter which Professor Waters had in mind when he spoke of the need for a new attitude towards the precedents in English law:[48]

> If English law is to possess a doctrine of constructive trusts which is to be remedial in character and therefore play the

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[46] Waters, The Constructive Trust 42 (1964).

[47] Id. at 25.

[48] Id. at 42.

> American role of giving to the deprived plaintiff a means of recovering more of his property, or what ought to be his property, than he is able to recover at law, it has got to think differently. It has got to think in terms of the act or event or occurrence lying behind the imposition of the constructive trust, and to cease to think of the abusing of relationships.

Somewhat ironically, it may be the very vagueness of the fiduciary concept which will provide the avenue for the development in English law of a remedial constructive trust. If, as some cases appear to suggest,[49] a fiduciary or quasi-fiduciary relationship may be brought into existence by the performance of the very act of which the plaintiff complains, then in effect the recovery which is granted, although related to the breach of the relationship, is granted because of the wrongful nature of the act complained of. The finding of the fiduciary relationship in these circumstances would seem to be no more than a matter of form, and could well be discarded in favour of a frank discussion of the policy considerations upon which the court determined to permit the plaintiff to avail himself of the equitable remedy. This matter will be pursued at a later stage.[50]

Finally, mention should be made of the importance of the fiduciary relationship in an area of the law which is intimately

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[49] See e.g. Sinclair v. Brougham [1914] A.C. 398 (H.L.) esp. per Lord Parker at 441-442, (and note the remarks by Fridman, Quasi Contractual Aspects of Unjust Enrichment (1956) 34 Can. Bar Rev. 393 at 402, Waters, The Constructive Trust 70-72 (1964), Goff and Jones, The Law of Restitution 40-43 (1966)), Bannister v. Bannister [1948] 2 All E.R. 133 (C.A.). See further, Chapter Three infra.

[50] See Chapter Three infra.

connected with the constructive trust. One of the advantages which accrues to a beneficiary under a constructive trust who is able to claim a proprietary interest in the property in question, is that he is entitled in equity to trace the trust property or its product into the hands of any transferee of the property, subject, however, to the defence of the bona fide purchaser for value without notice. In the famous case of Re Diplock[51] it was laid down by the Court of Appeal that in order for a claimant to be entitled to trace in equity "either there must be a fiduciary relationship between him and the defendant who holds the property, or, as a result of a fiduciary relationship between the claimant and another person through whose hands the property has previously passed, some equitable proprietary interest must have become attached to the property."[52] This requirement, it has been pointed out,[53] is based on pre-Judicature Act authority, which would seem no longer to be appropriate to prevent a plaintiff, who is the legal owner of property, albeit with no trust attached, from relying on his equitable ownership in circumstances where the legal remedy is inadequate. It is clear that as the law now stands capricious consequences may ensue. Thus:[54]

> Suppose that A's money is stolen by a stranger, B, who mixes the money with his

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[51] [1948] Ch. 465 at 530.

[52] Goff and Jones, The Law of Restitution 40 (1966).

[53] Maudsley, Proprietary Remedies for the Recovery of Money (1959) 75 L.Q. Rev. 234 at 241.

[54] Goff and Jones, The Law of Restitution 41 (1966).

> own money in his bank account. On the authorities as they stand, A cannot follow his money in equity. But if the thief, B, had been A's fiduciary agent and had stolen money entrusted to him, then A could have followed his property in equity, since a fiduciary relationship would have existed between the parties. B will generally be a man of straw so that the contest will be between A and B's general creditors. In these circumstances A should surely have priority over the general creditors of B. It is unjust that the general creditors should fortuitously benefit at the claimant's expense from the act of the bankrupt.

Again:[55]

> If B holds money as a fiduciary agent of A, and pays it by mistake to C who mixes it with money of his own, A can trace the money into C's hands, respecting C's rights if C is an innocent volunteer. And if C passes the property to D, A can trace against D. But if A and B were the same person, if A had the legal ownership as well as the beneficial, his rights would be taken away.

To the lawyer who is accustomed to thinking in terms of unjust enrichment, this requirement represents but one of a number of deficiencies in the tracing remedy as expounded in the Diplock[56] case.[57] Suffice it to say for the present, however, that the proponents of a

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[55] Maudsley, Proprietary Remedies for the Recovery of Money (1959) 75 L.Q. Rev. 234 at 243.

[56] [1948] Ch. 465 (C.A.).

[57] See e.g. G. K. Scott, Restitution from an Innocent Transferee Who is not a Purchaser for Value (1949) Harv. L. Rev. 1002.

remedial constructive trust would suggest that not only has the fiduciary relationship arrested the proper development of the English constructive trust, it has had a similar effect on the development of the equitable tracing remedy, that remedy being the foremost advantage which a beneficiary derives from the imposition of a constructive trust.

III. THE AMERICAN POSITION

A. The Constructive Trust as a Remedial Device

By way of contrast with English law, American law for many years has recognized that "the differences between the express trust and the constructive trust are greater than the similarities."[58] Accordingly, inasmuch as the term "constructive trust" might appear to suggest a fiduciary relationship which is analogous to an express trust, it is acknowledged to be not a completely happy expression in the American context.[59] It is true that there is a superficial resemblance between the two concepts,[60] but basically the constructive trust is regarded as a quite distinct legal entity from the express

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[58] Scott, V Trusts Para. 461 (3rd ed. 1967). This was not always so. The development of the conception of the constructive trust as a "generalized remedial device" is discussed in Dawson, Unjust Enrichment 26 (1951). See also, Dawson and Palmer, Cases on Restitution 16 (2nd ed. 1969).

[59] American Law Institute, Restatement of the Law of Restitution Para. 160, Comment a (1937).

[60] See e.g. Scott, Constructive Trusts (1955) 71 L.Q. Rev. 39 at 40.

trust.[61] It is not a substantive institution at all, but rather a remedial device which may be invoked in a wide variety of situations to compel the transfer of specific property to the claimant by the defendant in order to prevent the latter's unjust enrichment. Thus, Professor A. W. Scott states:[62]

> A constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. When a person holds the title to property which he is under an obligation to convey to another, and when that obligation does not arise merely because he has voluntarily assumed it, he is said to hold the property on a constructive trust for the other and he is called a constructive trustee of the property. He is not compelled to convey the property because he is a constructive trustee; it is because he can be compelled to convey it that he is a constructive trustee.

Constructive trusts and express trusts may be contrasted in the same general way as may quasi-contractual obligations and contracts.[63] That is to say, while with both contractual relationships and express

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[61] "An express trust and a constructive trust are not divisions of the same fundamental concept. They are not species of the same genus. They are distinct concepts.": American Law Institute, Restatement of the Law of Restitution Para. 160, Comment a (1937).

[62] Scott, V Trusts Para. 462 (3rd ed. 1967). See also, Pound, The Progress of the Law, Equity (1920) 33 Harv. L. Rev. 420, American Law Institute, Restatement of the Law of Restitution Para. 160, Comment a (1937), Scott, Constructive Trusts (1955) 71 L.Q. Rev. 39.

[63] American Law Institute, Restatement of the Law of Restitution Para. 160, Comment a (1937), Scott, V Trusts Para. 462.1 (3rd ed. 1967).

trusts a manifestation of an intention to be bound is essential to their validity, in the case of quasi-contracts and constructive trusts the absence of such an intention is irrelevant. On the other hand, a quasi-contractual obligation and a constructive trust closely resemble each other.[64] In imposing a quasi-contractual obligation it may be said that the court treats the defendant who has unjustly received a benefit at the expense of the plaintiff as if he had agreed to pay the plaintiff for it. Similarly, in imposing a constructive trust the court treats the defendant, who is the legal owner of property which has been unjustly acquired or retained at the plaintiff's expense, as if he had agreed to hold it on trust for the plaintiff, or it had been conveyed to him by one who intended that he so hold it.[65] Of course, in the former case there is no contract, and in the latter case there is no trust: the quasi-contract and the constructive trust are simply remedial devices employed by the court to prevent the unjust enrichment of the defendant.

The essential distinction between a quasi-contractual obligation and a constructive trust is that the former is regarded as a purely personal obligation, and is enforced by a money judgment, whereas the latter involves the creation of an equitable proprietary interest in some thing.[66] Consequently--and this is the significant feature of a constructive trust--a plaintiff in whose favour a constructive trust has

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[64] Id.

[65] Lacey, Constructive Trusts and Equitable Liens in Iowa (1954-55) 40 Iowa L. Rev. 107 at 114.

[66] Id.

been imposed has a right to the property in specie, and can obtain a preference over the general creditors of an insolvent defendant, or can recover the property from a transferee of the defendant, so long as the transferee is not a bona fide purchaser. However, in situations where the remedy at law is adequate, the constructive trust obligation generally will not be specifically enforced.[67]

The constructive trust in American law is the most important of the equitable restitutionary remedies.[68] It is complemented by the equitable lien, which gives the plaintiff a preferred claim against property, while not entitling him to ownership thereof,[69] and, in appropriate circumstances, by the equitable remedy of subrogation.[70] These are available, together with the legal remedies, whenever the defendant is unconscionably withholding property from the plaintiff.

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[67]This does not mean, however, that in such situations the defendant is not holding the property on a constructive trust: Scott, V Trusts Para. 462.3 (3rd ed. 1967). The following appear to be the situations in which the constructive trust will be specifically enforced: (1) where the legal title to the property has been transferred away by the wrongdoer (here the true owner may follow the property until it reaches the hands of a bona fide purchaser); (2) where the legal title remains in the hands of the wrongdoer, and the res consists of land, or a unique chattel; or the defendant is insolvent; or the defendant's wrongful act is in breach of a fiduciary or quasi-fiduciary relationship. See Note, Must the Remedy at Law Be Inadequate Before a Constructive Trust Will Be Impressed? (1951) 25 St. John's L. Rev. 283, and Scott, id., but cf. Bogert, V Trusts and Trustees Para. 472 (2nd ed. 1959), Jennings and Shapiro, The Minnesota Law of Constructive Trusts and Analogous Equitable Remedies (1941) 25 Minnesota L. Rev. 666 at 674-678.

[68]Scott, V Trusts Para. 461 (3rd ed. 1967).

[69]Id., Para. 463. See also Lacey, Constructive Trusts and Equitable Liens in Iowa (1954-55) 40 Iowa L. Rev. 107 at 116, 145-155.

[70]Scott, V Trusts Para. 464 (3rd ed. 1967).

It is for the court to decide which is the most appropriate remedy in the circumstances, among the relevant considerations in determining whether to invoke one of the equitable remedies being the adequacy of the remedy at law, and whether the plaintiff should be entitled to a preference over the general creditors of the defendant.[71]

B. Unjust Enrichment

Viewed as a remedy, and not as a type of trust, the constructive trust is a much more comprehensible concept than the English constructive trust. That is not to suggest, however, that the American concept is without its own difficulties of analysis. These centre around the scope of the unjust enrichment principle, which is the touchstone used by the court in determining in any situation whether the facts will justify the imposition of a constructive trust.

In an individual case it is understood that a finding of unjust enrichment "signifies a legal conclusion that because of the circumstances of its receipt a defendant should not be allowed to retain, or should make compensation for, a benefit he has received."[72] However, the basis for that conclusion is often not made clear, and the view has been expressed that "[o]pinions in close cases often suggest that the decision was based mainly on an instinctive feeling that relief should

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[71] It should be noted that the equitable lien and the remedy of subrogation do not inevitably involve the granting of a preference. See Lacey, Constructive Trusts and Equitable Liens in Iowa (1954-55) 40 Iowa L. Rev. 107 at 116, Scott, id.

[72] Lacey, Constructive Trusts and Equitable Liens in Iowa (1954-55) 40 Iowa L. Rev. 107 at 108.

be allowed."[73] The problem is, then, that while the basic moral idea inherent in the principle is easy enough to grasp,[74] the courts have been slow to develop "a systematic definition of the elements"[75] of unjust enrichment. They have been content instead to invoke it on a case-by-case basis. While it may be conceded that this approach has, on the whole, provided a satisfactory resolution of specific problems, the absence of any systematic approach has led to uncertainty. Thus, Professor Dawson in his work on Unjust Enrichment refers to ". . . a serious and growing confusion in analysis, a lack of overall intelligibility, and much difficulty in prediction."[76]

Notwithstanding these difficulties, it has been suggested that the unjust enrichment principle is really no more uncertain than other legal concepts such as negligence;[77] and that it is in any event a more appropriate starting point for the enquiry whether a constructive trust should be imposed than is the English search for a fiduciary relationship, since it focuses attention on the relevant issues, namely, the facts and circumstances surrounding the obtaining or retention by

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[73] Id.

[74] "For this by nature is equitable, that no one be made richer through another's loss.": Pomponius, cited in Dawson, Unjust Enrichment 3 (1951).

[75] Carlson, Restitution--The Search for a Philosophy (1953-54) 6 J. Legal Educ. 330 at 334.

[76] Dawson, Unjust Enrichment 112 (1951). The comment was directed at the whole field of restitutionary remedies, and not only the constructive trust.

[77] Scott, Constructive Trusts (1955) 71 L.Q. Rev. 39 at 50.

the defendant of the property in question.[78]

C. The Constructive Trust Situations

The great contribution of the treatise writers[79] has been to establish some order out of the cases by developing a classification of the main types of situations in which unjust enrichment has been found to exist, and a constructive trust imposed. The situations discussed by Professor Scott[80] are as follows: (1) Conveyance procured by fraud, duress, undue influence or mistake; (2) Acquisition of an interest in land under an oral agreement; (3) Acquisition of property on death (including secret trusts and acquisition of property by murder); (4) Acquisition of property by a fiduciary; (5) Acquisition of property from a fiduciary who in breach of his duty transfers it to one who is not a bona fide purchaser. By way of marked contrast with the English texts, there is tied in with the discussion of the constructive trust situations a discussion of the rules relating to the "following of property into its product." The basic principle is expressed as follows in the Restatement of the Law of Restitution, Para. 202:

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[78] "If he does not yet know all the answers, the American is asking the right questions. . . .": Waters, The Constructive Trust 25 (1964).

[79] See e.g. Bogert, Trusts and Trustees Para. 471 et seq. (2nd ed. 1959), Scott, Trusts Para. 461 et seq. (3rd ed. 1967). Cf. the classification in Newman, Trusts 254 (2nd ed. 1955) which is based on the manner of acquisition, i.e., tort or crime, contract, mistake involving neither of the first two, and defeat of reasonable expectation of acquisition.

[80] Scott, V Trusts Para. 465 et seq. (3rd ed. 1967). See also, Scott, Constructive Trusts (1955) 71 L.Q. Rev. 39 at 41.

> Where a person wrongfully disposes of property of another knowing that the disposition is wrongful and acquires in exchange other property, the other is entitled at his option to enforce either (a) a constructive trust of the property so acquired, or (b) an equitable lien upon it to secure his claim for reimbursement from the wrongdoer.

It will be noted that, unlike the English tracing rules, the principle thus laid down is applicable to all conscious wrongdoers, even in the absence of a pre-existing fiduciary relationship.

To one who is familiar with the operation of the constructive trust in English law it will be apparent that much of the ground which is covered by the American constructive trust is also covered by the English constructive trust. An important exception is the area of mistake. Professor Waters, who has advocated that English law should adopt the concept of the remedial constructive trust, has suggested a number of beneficial consequences which could flow from making available the constructive trust remedy to plaintiffs who are seeking to recover title to property which they have mistakenly transferred away. His great hope is that the availability of the constructive trust remedy in these circumstances would encourage a review of the whole field of legal and equitable mistake:[81]

> As Denning L.J. was at pains to point out in Solle v. Butcher,[82] there are precedents at hand . . . to enable the modern courts to look again at the whole relation of law

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[81] Waters, The Constructive Trust 46 (1964).

[82] [1950] 1 K.B. 671.

> and equity, to revaluate the adequacy of the whole English doctrine of mistake and to fashion an equitable restitution remedy which, though necessarily discretionary, as are and have been all equitable remedies, would replace the piecemeal remedy for mistake together provided at the moment by law and equity. It may well be that at first such a newly fashioned equitable remedy would only be capable of employment where the existent legal remedy is inadequate. But the path would have been set for the eventual reconciliation of this branch of constructive trust and quasi-contract under one head.

Furthermore, he suggests that this remedy, founded on unjust enrichment and not tied to the existence of a fiduciary relationship, could operate to mitigate the harshness of the ultra vires rule. For example, in Re Jon Beauforte (London) Ltd.,[83] a supplier of goods was denied recovery for the price on the basis that he had constructive notice that the goods would be used by the company for a purpose which was ultra vires. The remaining creditors in the company's liquidation thereby acquired a windfall benefit. Waters' comment on this case is that:[84]

> If English law would look upon the constructive trust as a remedy and nothing more, this sort of situation could not occur. Or at least we would look with a more critical eye at the value judgment which this decision contains as between the ultra vires rule and gratuitous enrichment. Does the shareholders' protection require the denial of restitution to innocent suppliers, and is not

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[83] [1953] Ch. 131.

[84] Waters, The Constructive Trust 53 (1964). See also, Goff and Jones, The Law of Restitution 322-324 (1966).

> this kind of protection unrealistic in the conditions of the modern commercial world?

Again, the remedy could be used to effect a preference in favour of a payor who has mistakenly paid money to another, and the latter has become bankrupt before the payor can recover. Why, in this situation, should the creditors of the bankrupt be gratuitously enriched?[85]

Finally, the remedy could be used not only in those circumstances where property is conveyed by mistake, but possibly also where, as a result of mistake, property has been ineffectively conveyed. Suppose that a would-be donor, A, has died thinking that his gift of Blackacre to B is well made. B, acting on the same assumption, has involved himself in expense, or otherwise changed his position:[86]

> . . . Are the heirs in a necessarily stronger position than the disappointed would-be donee when the balance of equities is struck? There is plenty of evidence to show that for a great many years American courts have been able to consider this sort of problem through the medium of the constructive trust, and to find very often for the would-be donee.[87]

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[85] Waters, The Constructive Trust 53 (1964).

[86] Id. at 54. See also, Re Berry (1906) 147 Fed. 208 (C.C.A. 2d).

[87] In English law, cf. Dillwyn v. Llewellyn (1862) De G.F. & J. 517, and the interpretation of that case offered by Allan, An Equity to Perfect a Gift (1963) 79 L.Q. Rev. 238. The case is usually cited as an example of equitable estoppel, but Allan suggests that it lays down a broad equity, namely, that where the donor acquiesces in the donee treating the disputed subject matter of a gift as if it were the donee's own, Equity enables the donee to sue the donor with a view to perfecting the gift.

IV. THE CANADIAN APPROACH

A. Judicial Views

Canadian decisions in the area of constructive trusts, in keeping with Canadian legal tradition,[88] have by and large followed the English approach. In the same way, therefore, the constructive trust is seen as institutional, and as being imposed by operation of law; but no clear rationale for the imposition of the constructive trust has been developed.

However, at least since the last quarter of the nineteenth century,[89] the American influence has been steadily increasing. Thus, in Taylor v. Davies,[90] Meredith C.J.O. approved a description of a constructive trust which was taken from an American text[91] and which did not predicate the existence of the trust on the existence of a fiduciary relationship. In Pahara v. Pahara,[92] Rand J., in permitting a husband

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[88] See e.g. Laskin, The British Tradition in Canadian Law 49 et seq. (1969).

[89] With the publication of Taylor's Commentaries on Equity Jurisprudence (1876) (Toronto), which was founded on the American Story's Equity Jurisprudence (1872).

[90] (1918) 41 D.L.R. 510 at 514 (Ont. S.C.A.D.), aff'd. (1920) 51 D.L.R. 75 (P.C.).

[91] "[W]henever the circumstances of a transaction are such that the person who takes the legal estate cannot also enjoy the beneficial interest without necessarily violating some established principle of equity the court will immediately raise a constructive trust and fasten it upon the conscience of the legal owner so as to convert him into a trustee for the parties who in equity are entitled to the beneficial enjoyment.": Hill on Trustees 144 (3rd ed. 1853).

[92] [1946] 1 D.L.R. 433 (S.C.C.).

to recover property which had been left by his wife to certain parties by a will which she had executed after entering into, and in violation of, a reciprocal wills arrangement with the husband, construed the situation as raising a trust in favour of the husband, the basis of the trust being the prevention of unjust enrichment.[93] More recently, in Schobelt v. Barber,[94] Moorhouse J. invoked a constructive trust based on unjust enrichment in order to prevent a husband who had murdered his wife from enjoying the benefit of certain property which thereby accrued to him by right of survivorship. The jus accrescendi was permitted to operate, but the husband was held to be a constructive trustee of the property, subject to a beneficial interest in himself for an undivided one-half, for the benefit of the next-of-kin of the deceased wife. In support of his conclusion Moorhouse J. cited the American authority, Scott.[95] Again, in Jirna Ltd. v. Mister Donut of

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[93] "As against her, [the wife], there was a trust, either express or implied in fact, of interests that can be called entireties which it is a fraud on the part of those who now represent her to repudiate. Against the unjust enrichment following that fraud, an equitable right to restitution is raised in favour of the respondent in the right which he originally sustained toward the property. This results from the operation of law and is consequently outside the prohibitions of the Statute of Frauds.": Id. at 437.

[94] [1967] 1 O.R. 349.

[95] Id. at 354, citing III Scott, Trusts 2383 (1st ed.): "In the absence of a statute otherwise providing, it would seem that the legal title to the property should pass to the murderer and that he is chargeable as a constructive trustee. . . . By imposing a constructive trust upon the murderer, the court is not making an exception to the provisions of the statutes [here the jus accrescendi is a doctrine of law], but is merely compelling the murderer to surrender the profits of his crime and thus prevent his unjust enrichment."

Canada Ltd.[96] Stark J. held that the defendant franchisor and the plaintiff franchisee were in a fiduciary relationship, and imposed a constructive trust on the franchisor "in order to prevent unjust enrichment."[97] The franchisor had been receiving rebates from suppliers of raw materials with whom the franchisee in accordance with the terms of the franchise agreement was obliged to deal.[98]

The ambiguity of Canadian judicial thinking on the matter was recently demonstrated in the Supreme Court of Canada decision in Murdoch v. Murdoch.[99] There, the issue was whether the wife was entitled, by virtue of the contributions which she had made, to a beneficial interest in certain property standing in the name of the husband. The majority accepted the decision of the trial judge that her contributions were not of a substantial nature and denied her claim to a beneficial interest. In the course of delivering the majority judgment Martland J. adopted a passage from the speech of Lord Diplock in Gissing v. Gissing,[100] concerning the nature of "a resulting, implied or

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[96][1970] 3 O.R. 629.

[97]Id. at 641.

[98]On appeal, the existence of the fiduciary relationship was denied, and the order that the franchisor should account to the franchisee overturned: (1972) 22 D.L.R. (3d) 639 aff'd. (1973) 40 D.L.R. (3d) 303 (S.C.C.).

[99](1974) 41 D.L.R. (3d) 367.

[100][1970] 2 All E.R. 780 (H.L.).

constructive trust."[101] Laskin J., dissenting, found that the wife had made a substantial contribution to the acquisition of the property and, in the absence of evidence of an agreement between the parties that the wife should acquire a beneficial interest he imposed a constructive trust, "which does not depend on evidence of intention."[102] In discussing the nature of a constructive trust Laskin J. referred to the American authority, Scott, to support the proposition that it was an equitable remedy which was founded on the concept of unjust enrichment.[103]

B. Academic Views

There has been very little comment by Canadian academic

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[101] Id. at 790. The passage states in part: "A resulting, implied or constructive trust--and it is unnecessary for present purposes to distinguish between these three classes of trust--is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land."

The first sentence of this passage has since been cited in several English Court of Appeal decisions as supporting the use of the constructive trust as a general equitable remedy: see e.g., Heseltine v. Heseltine [1971] 1 All E.R. 952, per Lord Denning M.R. at 955, Binions v. Evans [1972] Ch. 359, per Lord Denning M.R. at 368. However, it has been argued that Lord Diplock intended no such wide meaning to be given to his words, and that the second sentence must be regarded as placing an immediate limitation on the first: see Oakley, Has the Constructive Trust Become a General Equitable Remedy? (1973) 26 Current Legal Problems 17 at 26. This matter will be taken up in Chapter Three, infra.

[102] (1974) 41 D.L.R. (3d) 367 at 388.

[103] Id., referring to Scott, V Trusts Para. 404.2 (3rd ed. 1967).

writers on the nature of the constructive trust. However, encouraged perhaps by the warm reception which was accorded the common law restitution cases such as Deglman v. Guaranty Trust Company of Canada[104] and County of Carleton v. City of Ottawa,[105] at least two Canadian academics have indicated their support for the remedial view. Professor Bradley Crawford, in his Cases and Notes on Restitution[106] treats the constructive trust in his section on "Equitable Remedies".[107] Professor A. J. McClean, in his Cases and Materials on the Law of Trusts[108] commences his chapter on "Constructive Trusts" with the following remarks:[109]

> It is now generally accepted that the constructive trust is a remedial device used by the courts where it is thought the holder of title to property ought to hold it for the benefit of, or to account for it to, another. . . . [I]t is really part of the law of unjust enrichment or restitution, a division of the law well recognized in the United States and now gaining acceptance in England and Canada.[110]

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[104] [1954] S.C.R. 725.

[105] (1966) 52 D.L.R. (2d) 220 (S.C.C.). See further, the references collected in Jacobson, Murdoch v. Murdoch: Just About What the Ordinary Rancher's Wife Does (1974) 20 McGill L.J. 308 at 318, n. 51, and also, Bank of Nova Scotia v. Kelly (1974) 41 D.L.R. (3d) 273 (P.E.I.S.C.).

[106] Faculty of Law, University of Toronto (1971).

[107] Id. at 57 et seq.

[108] The University of British Columbia (3rd ed. 1970).

[109] Id. at 2-1.

[110] See also, McClean, Unjust Enrichment--Common Law Wine in Civil Law Bottles (1969) 4 U.B.C. L. Rev. 1.

CHAPTER TWO

THE CONSTRUCTIVE TRUST SITUATIONS

I. INTRODUCTION

This Chapter proceeds on the basis that in England and Canada there is no general principle which underlies the cases and provides a common theme for the constructive trust situations. While catch phrases such as "unjust enrichment", "a want of probity in the trustees", "prevention of fraud" and "equity and good conscience" have from time to time been offered, they are either inappropriate to describe particular constructive trust situations,[1] or so broad as to be of little assistance as a tool for analysis.

Furthermore, the Chapter proceeds on the basis that the prevailing attitude in England and Canada is that the constructive trust is institutional in nature. There are, it is true, indications that the courts in both jurisdictions may be moving towards the concept of the constructive trust as a general equitable remedy, and these will be explored in the following Chapter; but at this stage it would be premature to suggest that this approach represents the accepted position in either jurisdiction.[2]

In consequence, the constructive trust will be discussed in this Chapter simply by identifying and discussing a number of different

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[1] Thus e.g. "unjust enrichment" does not explain the secret trust cases where the court enforces the trust onwards in favour of the beneficiary and does not simply order restitutio in integrum.

[2] See e.g. Snell, Principles of Equity 186 (27th ed. Megarry and Baker 1973).

situations in which such a trust has been held to exist. Over a period of time, some of these situations have developed into well recognized categories of constructive trusts, while others do not fit happily into any category, and still others (for example, secret trusts and mutual wills) remain the subject of controversy as to whether they should properly be described as constructive trust situations at all. We turn now to an examination of these situations.

II. THE VENDOR AS CONSTRUCTIVE TRUSTEE

It is a generally accepted proposition that where there is a specifically enforceable[3] contract for the sale of land the purchaser is regarded in equity as the owner of the land, and the vendor is considered to be a trustee thereof for the purchaser.[4] By operation of the equitable doctrine of conversion the interest of the vendor is treated from the date of execution of the contract as an interest in personalty, namely, the purchase price, in order to secure which he has a lien or

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[3] "The basis of the trusteeship is that the purchaser is entitled to call for specific performance of the contract and therefore takes an equitable interest in the property. It follows that the contract in question must be specifically enforceable.": Parker and Mellows, The Modern Law of Trusts 159 (2nd ed. 1970). See also, Holroyd v. Marshall (1862) 10 H.L.C. 191, per Lord Westbury L.C. at 209-210, Howard v. Miller [1915] A.C. 318 (P.C.), per Lord Parker of Waddington at 326, Buchanan and James v. Oliver Plumbing and Heating Ltd. (1959) 18 D.L.R. (2d) 575 (Ont. C.A.), per Schroeder J.A. at 579. Cf. the discussion by Pettit, Conversion Under a Contract for the Sale of Land (1960) 24 Conv. (N.S.) 47 at 55-58.

[4] See e.g., Green v. Smith (1738) 1 Atk. 572, per Lord Hardwicke at 573, Shaw v. Foster (1872) L.R. 5 H.L. 321, per Lord Chelmsford at 333, Lysaght v. Edwards (1876) 2 Ch. D. 499, per Jessel M.R. at 506.

charge over the land which is the subject of the sale.[5] However, as Messrs. Parker and Mellows have commented:[6]

> The trusteeship is . . . of a somewhat novel kind because the vendor also retains until completion a beneficial interest in the property and this means that he can occupy the land and enjoy the rents and profits until that date. At the same time he must, because he is a trustee, manage and maintain the property with all the care required of any other trustee.

For many years there has been controversy as to the precise mode of operation of this trust, and in particular, as to the time at which the vendor becomes a trustee. The earliest accepted view was that the trust arose upon the execution of the contract of sale,[7] just as the implied use (to which may be traced the origin of this constructive trust) was at the beginning of the sixteenth century understood to arise in favour of B when A bargained and sold lands to B.[8] From the time of execution there was a conversion, in consequence of which the purchaser acquired an equitable interest in the land.[9]

This view was modified in later cases. In Wall v.

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[5]See e.g., Lysaght v. Edwards id., Hillington Estates Co. v. Stonefield Estates Ltd. [1952] Ch. 627, per Vaisey J. at 631, Buchanan and James v. Oliver Plumbing & Heating Ltd. (1959) 18 D.L.R. (2d) 575, per Schroeder J.A. at 581.

[6]Parker and Mellows, The Modern Law of Trusts 159 (2nd ed. 1970).

[7]White v. Nutts (1702) 1 P.W. 61, per Lord Keeper Wright at 62.

[8]Waters, The Constructive Trust 74 (1964).

[9]Lady Foliamb's Case (1651), cited in Davie v. Beversham (1661) Nel. 76.

Bright.[10] Plumer M.R. suggested that the trust arose when good title was made out or accepted, and the purchase money paid. Between the time of execution and the time when the vendor was bound to convey the vendor was not a trustee in the full sense, but was a trustee sub modo, i.e., he was on his way to becoming a trustee. Nevertheless, under this theory conversion was regarded as taking place at the date of execution in expectation of proof of title and payment of the purchase price. Support for this view was expressed by Lord O'Hagan and Lord Hatherley L.C. in Shaw v. Foster.[11] However, Lord Chelmsford[12] and Lord Cairns[13] in that case seemed content to adopt the view that the trust arose at the time of execution, Lord Cairns adding the qualification that the trust relationship subsisted "subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property."[14]

Yet a third view was advanced by Kindersley V.C. in Dawson v. Solomon.[15] He suggested that the trust arose at the date fixed for completion. Between the date of execution and that date the beneficial interest remained in the vendor. If the contract were not completed on the specified date the vendor held as a trustee sub modo until

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[10](1820) 1 Jac. & W. 494 at 503.

[11](1872) L.R. 5 H.L. 321 at 349, 357, respectively.

[12]Id. at 333.

[13]Id. at 338.

[14]Id.

[15](1859) 1 Dr. & Sm. 1 at 9-10.

acceptance of title and payment of the purchase price. It was not clear under this theory from what point in time conversion operated.

In Lysaght v. Edwards[16] Jessel M.R. seemed to favour a variation of the reasoning of Plumer M.R. in Wall v. Bright.[17] In his view the trust arose at the time that a binding contract came into being, and this occurred when good title was made out or accepted by the purchaser, but did not require actual payment of the purchase price. Thereupon the trust related back to the time of execution of the contract. Once the purchase price was paid the vendor no longer had a beneficial interest in the property, and held as a bare trustee for the purchaser.[18]

The whole matter came up for review in Rayner v. Preston,[19] although there the issue was not (as it had been in Wall v. Bright[20] and Lysaght v. Edwards[21]) the moment of conversion for the purposes of deceased's estates, but rather, what property was subject to the constructive trust. The facts were that a vendor had contracted with a purchaser for the sale of a house which had been insured against fire by the vendor. The contract contained no reference to the insurance.

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[16](1876) 2 Ch. D. 499.

[17](1820) 1 Jac. & W. 494.

[18](1876) 2 Ch. D. 499 at 506-510.

[19](1881) 18 Ch. D. 1.

[20](1820) 1 Jac. & W. 494.

[21](1876) 2 Ch. D. 499.

After the date of the contract, but before the time fixed for completion, the house was damaged by fire. The vendor received payment from the insurance company, and the purchaser, who had already paid the purchase price, claimed to be entitled as against the vendor to the insurance money. The Court of Appeal (Cotton and Brett L.JJ., James L.J. dissenting) held that the purchaser was not so entitled.[22]

Cotton L.J. acknowledged that where there was a specifically enforceable contract of sale the vendor was trustee of the property for the purchaser, but held that the trust existed "only in respect of the property contracted to be sold."[23] This did not include rents received prior to completion, nor did it include the insurance policy, the proceeds of which were payable, if at all, under the terms of the contract of insurance, and in that contract the purchaser had no interest.

On the other hand, James L.J. used the existence of the trust relationship as the basis of his dissent. In his view, the trust arose upon completion of the contract, or when all but the formalities of completion remained, and related back to the time of execution. As a result of the existence of this trust the purchaser was entitled to the proceeds of the policy: "any right which is vested in a trustee--any benefit which accrues to a trustee, from whatever source or under whatever circumstances, by reason of his legal ownership of the property--that right and that benefit he takes as trustee for the beneficial

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[22]The matter is now covered by the Law of Property Act, 1925, Section 47(1) and (2).

[23](1881) 18 Ch. D. 1 at 6.

owner."[24]

Brett L.J. agreed with Cotton L.J. on the collateral nature of the policy, and that determined the case in favour of the vendor. However, he disagreed with both Cotton and James L.JJ. on the applicability of the trust concept to the vendor-purchaser relationship:[25]

> With the greatest deference, it seems wrong to say that the one is a trustee for the other. The contract is one which a Court of Equity will enforce by means of a decree for specific performance. But if the vendor were a trustee of the property for the vendee, it would seem to me to follow that all the product, all the value of the property received by the vendor from the time of the making of the contract ought, under all circumstances, to belong to the vendee.
>
> What is the relation between them, and what is the result of the contract? Whether there shall ever be a conveyance depends on two conditions; first of all, whether the title is made out, and, secondly, whether the money is ready, and unless those two things coincide at the time when the contract ought to be completed, then the contract never will be completed, and the property never will be conveyed. But suppose at the time when the contract should be completed, the title should be made out and the money is ready, then the conveyance takes place. Now it has been suggested that when that takes place, or when a Court of Equity decrees specific performance of the contract, and the conveyance is made in pursuance of that decree, then by relation back the vendor has been trustee for the vendee from the time of making the contract. But again, with deference, it appears to me that if that were so, then the vendor would in all cases be trustee for the vendee of

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[24] Id. at 13.

[25] Id. at 10-11.

> all the rents which have accrued due and which have been received by the vendor between the time of the making of the contract and the time of completion; but it seems to me that that is not the law. Therefore, I venture to say that I doubt whether it is a true description of the relation between the parties to say that from the time of the making of the contract, or at any time, one is ever trustee for the other.

Of the three views which were expressed in Rayner v. Preston,[26] Canadian courts have preferred that of James L.J., at least so far as it concerns the time at which the trust arises.[27] It is recognized, however, that the trust is not an absolute one. Thus, in Buchanan and James v. Oliver Plumbing, Schroeder J.A. states:[28]

> It is to be observed that in these cases the trusteeship is not from the beginning an absolute one, for it is recognized that the vendor has a personal and substantial interest in the property which he is bound to protect. His beneficial interest in the land consists first in his lien thereon for the price, and this involves his right to hold possession of the land until the whole purchase-money is paid as well as the right to take for his own use the rents and profits up to the proper time for completion.

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[26] Id.

[27] See e.g., The King v. Caledonian Insurance Co. [1924] 2 D.L.R. 649 (S.C.C.), per Duff J. at 655, Buchanan and James v. Oliver Plumbing and Heating Ltd. (1959) 18 D.L.R. (2d) 575 (Ont. C.A.), per Schroeder J.A. at 580.

[28] (1959) 18 D.L.R. (2d) 575 at 581.

Professor Waters has suggested[29] that the concern shown in the cases to discover the mode of operation of the trust arising under a contract of sale has had the effect of diverting attention from the real issue, which is the essential validity of the trust concept in this context. He describes the judgment of Brett L.J.[30] as "the simple expose of the incompatibility of the trust to the vendor/purchaser relationship."[31] The present writer agrees that it would have been preferable if the law of contract had expanded to govern the relationship of the parties pending completion; but it is surely too late now to rewrite the law. We must continue to live with this peculiar trust, which arises only upon completion and relates back, and which makes the vendor in some respects a trustee for the purchaser, while still retaining for himself a beneficial interest in the land.

III. UNAUTHORIZED PROFIT BY AN EXPRESS TRUSTEE

A. Statement of the Rule

It is a fundamental rule that a trustee must not allow himself to be put in a position where his interest and duty may conflict. An offshoot of this rule is the rule that a trustee must not profit from

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[29] Waters, The Constructive Trust 75 (1964).

[30] Rayner v. Preston (1881) 18 Ch. D. 1 at 10-11.

[31] Waters, The Constructive Trust 86 (1964).

his trust.[32] Hence, an express trustee who obtains a benefit either directly or indirectly as a result of his trusteeship is accountable for it to the beneficiaries of the trust. Since the rule is designed for the protection of the beneficiaries it may be waived by them upon full disclosure being made.[33]

If the trustee does secure an unauthorized benefit he will be required to hold it subject to the terms of the express trust. The beneficiaries are entitled to the benefit in specie, or they may follow it into any form into which it has been converted by the trustee. Where appropriate, they may avail themselves of a personal action in equity for an accounting.[34]

B. Keech v. Sandford[35]

The locus classicus of both the "conflict" and the "profit" rules is Keech v. Sandford,[36] which concerned the renewal of a lease. The lessee of the profits of a market had devised his estate to a trustee on trust for an infant. Prior to the expiration of the lease the trustee applied to the lessor for a renewal of the lease for the benefit of the infant. The lessor, being dissatisfied with the legal

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[32]See McClean, The Theoretical Basis of the Trustee's Duty of Loyalty (1969) 7 Alta. L. Rev. 218, Boardman v. Phipps [1967] 2 A.C. 46, per Lord Upjohn (dissenting) at 123.

[33]Boardman v. Phipps [1967] 2 A.C. 46 (H.L.).

[34]Hanbury, Modern Equity 220 et seq. (9th ed. Maudsley 1969).

[35](1726) Sel. Cas. Ch. 61.

[36]Id.

security for the rent,[37] refused to renew for the benefit of the infant, but did agree to lease to the trustee for his own benefit. The infant successfully sued the trustee for an assignment of the lease, and for an account of the profits since renewal. In the course of his judgment Lord King L.C. emphasized the conflict of interest which might otherwise arise:[38]

> I must consider this as a trust for the infant, for I very well see that if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to cestui que use. Although I do not say there is a fraud in this case, yet the trustee should rather have let the lease run out, than to have had it to himself. It may seem hard that the trustee is the only person of all mankind who might not have the lease, but . . . it is very obvious what would be the consequence of letting trustees have the lease on refusal to renew to cestui que use.

The rule laid down in Keech v. Sandford[39] was extended to situations involving the acquisition by a trustee of the reversion expectant on a lease. According to the earlier cases, the trustee was accountable wherever he had acquired the reversion by fraud, or by virtue of his position as lessee (as, for example, where the landlord

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[37] Since the lease was of the profits only, and not of the land, the remedy of distress was not available to the lessor. He could sue upon the covenant only, and an infant would not be bound thereby.

[38] (1726) Sel. Cas. Ch. 61 at 62.

[39] Id.

made an offer of enfranchisement to all his tenants);[40] but otherwise, he was accountable only where the lease was renewable by custom or agreement.[41] Recently, however, in Protheroe v. Protheroe[42] the Court of Appeal held that the purchased reversion was subject to the terms of the trust even though there was no evidence of a right or custom of renewal. Lord Denning M.R. said:[43]

> There is a long established rule of equity from Keech v. Sandford downwards that if a trustee, who owns the leasehold, gets in the freehold, that freehold belongs to the trust and he cannot take the property for himself.

This decision has given rise to some comment. One interpretation[44] which has been offered is that the case really broke no new ground, and that the trustee was obliged to hold the reversion for the

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[40] Griffith v. Owen [1907] 1 Ch. 195, per Parker J. at 205.

[41] See e.g., Phipps v. Boardman [1964] 2 All E.R. 187, per Wilberforce J. at 201-202: "By contrast with the familiar case of a renewal of the lease, typified by Keech v. Sandford (1726) Sel. Cas. Ch. 61, which, if made by a person in a fiduciary position, becomes the property of the trust, the purchase of a reversion does not have this effect, unless the lease is renewable by contract or custom: see Bevan v. Webb [1905] 1 Ch. 620. The reason for this is that, whereas in the case of a renewal the trustee is in effect buying a part of the trust property, in the case of a reversion this is not so; it is a separate item altogether, and therefore the trustee may purchase it unless, in so doing, he is in effect destroying part of the trust property; or, to use the words of Sir William Grant, he intercepts and cuts off the chance of further renewals; see Randall v. Russell (1817) 3 Mer. 190 at p. 197."

[42] [1968] 1 W.L.R. 519.

[43] Id. at 521.

[44] Crane, Note (1968) 32 Conv. (N.S.) 220 at 221.

benefit of the trust because his position as lessee gave him a special advantage in acquiring the reversion. The other view[45] which has been expressed is that Lord Denning M.R., in not limiting his remarks to renewable leases, did indeed state the rule in terms wider than had been previously accepted, but that this broad formulation of the rule is in keeping with the spirit of Keech v. Sandford.[46]

From these particular applications of Keech v. Sandford[47] in situations involving the renewal of leases and the purchase of reversions, there developed the more general principle which prohibits trustees from profiting from their trusts.[48]

C. Some Decisions Involving the "Profit" Rule

A fairly recent Canadian decision involving the application of this rule is Re Pick Estate[49] where a trust company, being a trustee under a will, invested certain of the estate funds in its own

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[45] See e.g., Jackson, Trustees Purchasing Reversions (1968) 31 Mod. L. Rev. 707 at 710: "The basis of the decision in Keech v. Sandford was the danger to the beneficiary; that decision is not confined to leases renewable by custom or as of right. Should not the rule relating to the purchase of the reversion be equally wide?"

[46] (1726) Sel. Cas. Ch. 61.

[47] Id.

[48] See Cretney, The Rationale of Keech v. Sandford (1969) 33 Conv. (N.S.) 161 at 162. McClean, The Theoretical Basis of the Trustee's Duty of Loyalty (1969) 7 Alta. L. Rev. 218 at 220 traces the origin of the "profit" rule as an independent basis for liability to the speech of Lord Brougham in Hamilton v. Wright (1842) 9 Cl. & Fin. 110 at 124.

[49] (1965) 52 W.W.R. 136 (Sask. Surrogate Ct.). See also, Ferrier v. Reid and Knight (1966) 55 W.W.R. 299 (B.C.S.C.).

"guaranteed investment certificates", the terms of which provided inter alia that interest earned over the guaranteed rate should be retained by the trust company for its own benefit. The court held that the trust company was obliged to account for the profits to the estate.

The close relationship between the "profit" rule and the "conflict" rule is illustrated by the fact that the court in the Pick Estate case supported its decision by referring to the Supreme Court decision in National Trust Co. v. Osadchuk.[50] There, the appellant trust company had invested with its own funds in two mortgages. Subsequently, the company in its books debited the Osadchuk estate, of which it was administrator, with an equivalent amount, and claimed to have then allocated the mortgages to the estate. The investments turned out badly, involving "a serious, if not total, loss of both amounts."[51] The Supreme Court agreed with the trial judge, and a majority of the Saskatchewan Court of Appeal, that the transaction amounted to a sale by the company to itself as administrator, and was therefore void. The trust company was ordered to account to the estate, with interest, for the amount involved. In the course of his judgment Hudson J. emphasized that a trustee is bound not to do anything which can place him in a position inconsistent with the interests of his trust, or which can have a tendency to interfere with his duty in discharging it.[52]

An interesting decision in which it was held that the "profit"

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[50] [1943] S.C.R. 89.

[51] Id. at 91, per Hudson J.

[52] Id. at 92.

rule was not, on the facts, infringed is Crocker and Croquip Ltd. v. Tornroos.[53] The appellant Crocker, the deceased Tornroos and one Dietrich were the shareholders in equal shares of a private company. The Articles of Association of the company provided that if a shareholder should desire to sell his shares he must first offer them to the other members of the company, who were entitled to purchase them on a pro rata basis, or if only one member wished to purchase, he was entitled to purchase the whole. Tornroos died, having appointed Crocker one of his executors. Subsequently, Dietrich died and his widow sold the Dietrich shares to Crocker. Before entering into the purchase Crocker had obtained legal advice which indicated that under the terms of the Tornroos will it was not open to the Tornroos estate to acquire any part of the Dietrich shares. The respondents, who were the beneficiaries under the Tornroos will, brought action claiming to be entitled to one-half of the Dietrich shares. Kellock J., on behalf of the Supreme Court, dismissed the claim. He acknowledged that a trustee might not place himself in a situation where his interest and duty conflicted but held that no such conflict did exist on the facts before him. Crocker, in purchasing the Dietrich shares, was simply exercising a personal, contractual right vested in him under the Articles of Association, to buy all the shares offered where there was no competing shareholder:[54]

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[53](1957) 7 D.L.R. (2d) 104 (S.C.C.).

[54]Id. at 111.

> The fact that the Tornroos estate could not be a buyer was not due to anything for which the appellant Crocker, by reason of any act or default of his, as trustee, was responsible. Crocker, accordingly, had a right to buy upon the footing of the articles. . . .

It will be recalled that in Keech v. Sandford[55] the inability of the beneficiary to take the benefit (because the lessor refused to sell to him) was held to be not a sufficient basis for permitting the trustee personally to take the benefit. The decision in the Tornroos[56] case would appear to involve a relaxation of the stringent "duty of loyalty" which was demanded of the trustee in Keech v. Sandford[57] and some concern has been expressed over the implications of the decision.[58]

IV. STRANGERS INTERMEDDLING WITH THE TRUST

A. Trustees de son Tort

A person who, though not appointed a trustee, takes upon himself to act as such and to possess and administer trust property for the beneficiaries is known as a trustee de son tort.[58a] Such a person

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[55](1726) Sel. Cas. Ch. 61.

[56](1957) 7 D.L.R. (2d) 104.

[57](1726) Sel. Cas. Ch. 61.

[58]McClean, The Theoretical Basis of the Trustee's Duty of Loyalty (1969) 7 Alta. L. Rev. 218 at 230-232.

[58a]See Selangor United Rubber Estates Ltd. v. Cradock (No. 3) [1968] 2 All E.R. 1073, per Ungoed-Thomas J. at 1095. The expression

[Continued on next page.]

is regarded in law as if he had been properly appointed a trustee, and will be held liable for acts which, if done by a properly appointed trustee, would amount to a breach of trust. Usually, there is no question of dishonesty in these cases; the trustee de son tort is purporting to act on behalf of the beneficiaries, and not for his own advantage.[59] The liability of the trustee de son tort does not arise from the mere fact that he assumed to act as trustee:[60]

> The essence of his liability, is knowing, actually or constructively, that the property in his possession is trust property, and acting in a manner with it which is incompatible with the trust terms or with the fact that it is trust property.

There is some question as to the degree of control which is necessary in relation to the trust property in order for a stranger to be considered a trustee de son tort. In Selangor United Rubber Estates Ltd. v. Cradock (No. 3),[61] Ungoed-Thomas J. seemed to imply that "possession" of the property alone was sufficient. However, Professor Waters[62] has suggested that, as a practical matter, the "trustee" must

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[Continued from page 49.]
appears to have been borrowed from the law relating to the administration of assets, where "executor de son tort" refers to a stranger who takes upon himself, without authority, to act as executor: see Pettitt, Equity and the Law of Trusts 115 (2nd ed. 1970).

[59] Selangor United Rubber Estates Ltd. v. Cradock (No. 3) [1968] 2 All E.R. 1073, per Ungoed-Thomas J. at 1095.

[60] Waters, The Law of Trusts in Canada 341 (1974).

[61] [1968] 2 All E.R. 1073 at 1095.

[62] Waters, The Law of Trusts in Canada 342 (1974).

have acquired some title right in the property in order to be able to administer it. Waters suggests that possession accompanied by the power to confer title will constitute sufficient control. This view is in line with the older English decisions and the Canadian decisions.

For example, the matter was considered by Kekewich J. in Re Barney,[63] and he concluded that a trustee de son tort must have either the legal title to the property, or the right to call for it.[64] On the facts of that case he held that the requisite control did not exist. Two friends of the family of the deceased, Barney, and his widow agreed to assist the widow to carry on the deceased's business. No authorization appeared in the will for the carrying on of the business, and the friends were aware that to do so without the consent of the court amounted to a breach of trust. The business was carried on at a loss, and an action was brought by some of the children (who were the ultimate beneficiaries under the will) seeking to make the two friends responsible as trustees de son tort. Neither of the defendants had received any remuneration for his services, and there was no suggestion of fraud. The case against them was that they controlled the money in a banking account which was opened in the name of Mrs. Barney for the purpose of running the business. Under the arrangement which had been made she could not draw on the account without the cheque being initialled by both defendants. However, neither one of them had the power to draw

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[63] [1892] 2 Ch. 265.

[64] "I hold that it is essential to the character of a trustee that he should have the trust property either actually vested in him, or so far under his control that he has nothing to do but require that, perhaps by one process, perhaps by another, it should be vested in him": id. at 272-273.

on the account. Kekewich J. held that the moneys were not under their control in any sense that would make them liable as trustees de son tort:[65]

> I apprehend that when the law says that a man is responsible as trustee for money under his control, it means money which he can, if he will, put into his own pocket or pay away as he pleases to someone else. That appears to me to be the test.

Similarly, in the British Columbia decision in Constantine v. Ioan and Chase,[66] Gould J. held that "It is . . . essential to the character of a trustee de son tort that he should have trust property either actually vested in him, or so far under his control that he is in a position to require that it should be vested in him."[67] Again, on the facts, he held that the required control did not exist. Ioan had acquired approximately $10,000 cash by selling certain property in breach of an unregistered joint tenancy agreement to which he and Constantine were parties, to an innocent third party. Being an old man, and in fear that the money might be taken from him by a potential swindler, Ioan persuaded the defendant Chase to open with him a joint bank account which required both their signatures for a withdrawal; and into this account he placed the proceeds of sale. Shortly thereafter, Chase learned of the origin of the funds, and that there was

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[65] Id. at 276.

[66] (1969) 67 W.W.R. 615 (B.C.S.C.).

[67] Id. at 623, citing Underhill, Law of Trusts and Trustees 217 (11th ed. 1959).

some dispute between Constantine and Ioan concerning the sale of the property. Over a period of time Ioan withdrew and apparently expended the whole of the sale proceeds, Chase co-signing cheques at his request, since he felt that he was not in a position to do otherwise. Constantine subsequently sued Ioan for breach of their agreement, and sought to make Chase liable as a co-trustee with Ioan of the sale proceeds. Gould J. accepted that Ioan was holding the proceeds upon trust for Constantine, and held that there should be judgment against him. With respect to Chase, Gould J. held that he was a trustee of Ioan as a result of his joint signing authority on the joint bank account. The crucial issue was whether Chase had such knowledge of the relationship subsisting between Ioan and Constantine and such control over the funds that he could be held further to be a trustee de son tort in relation to Constantine. Gould J. held that he did not:[68]

> [A]t any time during this period [Ioan] could have demanded the liquidation of the trust, if such it was, and the retirement of Chase as a co-signer of cheques[69] . . . . During this period at no time did Chase have dominion and control over the assets. At best he had a de facto veto over withdrawal of the assets unilaterally cancellable at any time by [Ioan].

On the other hand, in Maguire v. Maguire and Toronto General

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[68] Id. at 621.

[69] Citing Re SEttled Estates Act: Re McCrossan Trust (1961-62) 36 W.W.R. 209 (B.C.).

Trusts Corporation,[70] the defendant was held to have sufficient control over the trust funds to make him a trustee de son tort. The plaintiff in that case was the beneficiary of a trust which had been set up under the will of his uncle. During the infancy of the plaintiff the interest from the fund was paid to the plaintiff's aunt, to be used for his maintenance. While still an infant the plaintiff was desirous of making a substantial loan to a friend. The aunt did not wish to let him have the money for this purpose; however, she did sign a cheque for the amount in favour of the plaintiff's elder brother, in effect leaving him with the responsibility for making the decision whether the loan should be made. The brother did in fact pay over the money, which subsequently proved irrecoverable. The plaintiff, some five years after attaining his majority, sued the brother for the amount of the loss.[71] Rose J. held that since the defendant knew that the money was trust money he became a trustee de son tort after receiving it from the aunt. He thereby acquired legal title to the money and the power to confer that legal title upon someone else. However, Rose J. held that since the plaintiff had waited so long after coming of age before bringing the action he must be taken to have adopted the transaction as his own; and so, ultimately, the defendant was held not liable.

B. Other Intermeddlers.

If a stranger knowingly receives trust property, whether

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[70](1921) 64 D.L.R. 204 (Ont. S.C.).

[71]Within a year of attaining his majority the plaintiff had executed a release in favour of the aunt and the trust company, the latter being the trustees under the will.

gratuitously or for value, and also knows that it is transferred to him in breach of trust, he will be deemed to be holding the property upon a constructive trust for the beneficiaries of the express trust.[72] The same rule applies to one who receives the property innocently, but subsequently becomes aware of the existence of the trust, and deals with the property in a manner which is inconsistent therewith.[73]

Knowledge of the existence of the trust, and that the transfer was in breach of trust, may be either actual or constructive; but it is essential in order to make the recipient liable as a constructive trustee. "[I]n other words," as Danckwerts L.J. stated in Carl Zeiss Stiftung v. Herbert Smith & Co. (No. 2),[74] "he [the recipient] must be a party to a fraud or breach of trust on the part of the actual trustee." The requirement was held to have been satisfied in the Canadian case of Ankcorn v. Stewart.[75] There, the defendant beneficiary was assured by the trustees when they conveyed the trust property to him, that there were no other claims against the property. The beneficiary knew that by the terms of the trust there was another claim against the property, but in good faith he accepted the assurances of the trustees that this claim had been extinguished. In a subsequent action by the other interested party the defendant was held liable as a constructive trustee.

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[72] See e.g., Ankcorn v. Stewart (1920) 54 D.L.R. 74 (Ont. A.D.).

[73] See e.g., Nelson v. Larholt [1948] 1 K.B. 339, Carl Zeiss Stiftung v. Herbert Smith & Co. (No. 2) [1969] 2 Ch. 276, per Danckwerts L.J. at 290.

[74] [1969] 2 Ch. 276 at 290, (citing 38 Halsbury's Laws of England, Para. 1447 (3rd ed. Hailsham 1962)).

[75] (1920) 54 D.L.R. 74.

"[K]nowing all the facts," said Riddell J., "however innocent he may have been of fraudulent intent, [the beneficiary] must be considered as holding the land upon the same trusts as his grantor."[76] On the other hand, merely to show that the recipient provided no consideration.[77] or that he had knowledge of a disputed claim to the property, the validity of which he was not in a position to assess,[78] will not satisfy the knowledge requirement.

A recipient of trust property who did not know of the existence of the trust, and was not a purchaser for value without notice,[79] is in the position of an innocent volunteer. As such, he will be liable to restore the trust property if he still possesses it, but will not be chargeable as a trustee if he has parted with it or mixed it with his own property.[80]

It should be noted that a person who does not actually receive trust property may also incur liability to the beneficiaries as a constructive trustee if he knowingly assists in a fraudulent design on the part of the trustee.[81] The problem most often arises, (although

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[76] Id. at 87.

[77] Re Diplock [1948] Ch. 465 at 478 (C.A.).

[78] Carl Zeiss Stiftung v. Herbert Smith & Co. (No. 2) [1969] 2 Ch. 276.

[79] There is no remedy against a purchaser for value without notice: see e.g., Pilcher v. Rawlins (1872) 7 Ch. App. 259.

[80] Re Diplock [1948] Ch. 465 at 524, 539 (C.A.). See further, Snell, Principles of Equity 187 (27th ed. Megarry and Baker 1973).

[81] See e.g., Barnes v. Addy (1874) 9 Ch. App. 244, per Lord Selborne L.C. at 251.

not exclusively), in relation to agents of trustees, such as bankers or solicitors. The rule was stated as follows by Lord Selborne L.C. in Barnes v. Addy:[82]

> [S]trangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.

In that case, the solicitor to the surviving trustee of a family trust who advised the latter against appointing another sole trustee of one half of the trust fund, but nevertheless on his instructions drew up the necessary documents to implement the appointment, was held not liable when the newly appointed trustee misapplied the trust fund for his own purposes and became bankrupt . By comparison, in Selangor United Rubber Estates Ltd. v. Cradock (No. 3),[83] the issue was the liability of various defendants who had been involved in operations the general purpose of which was the employment of the plaintiff company's money in the purchase of its own shares. Some of the defendants knew the nature of these transactions, while others did not know, but should have known, that the payments were improper and dishonest applications of the company's assets. All were held liable, Ungoed-Thomas J.

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[82] Id.

[83] [1968] 2 All E.R. 1072. See also, Karak Rubber Co. Ltd. v. Burden [1972] 1 W.L.R. 602 (Ch. D.).

stating inter alia that the knowledge which was required in order to impose liability was "knowledge of circumstances which would indicate to an honest, reasonable man that [a dishonest and fraudulent] design was being committed or would put him on inquiry, which the stranger to the trust failed to make, whether it was being committed."[84]

An agent of trustees will be held liable as a trustee de son tort where he receives dominion and control of trust property and knowingly acts in a manner which is inconsistent with the terms or with the existence of the trust.[85] A case in point is Lee v. Sankey,[86] where the trustees of a will employed the defendant solicitors to receive the proceeds of sale of the testator's real estate. The solicitors improperly paid over the proceeds to one only of the trustees, who subsequently became bankrupt, and it was held that they were liable to make good the loss to the trust estate.

C. Basis of Liability

It has been suggested by Professor Marshall[87] that a trustee de son tort is not merely a type of constructive trustee, and must be distinguished from a constructive trustee. The former, he says, is one

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[84][1968] 2 All E.R. 1073 at 1104. It has been suggested that the standard of conduct which was required of the defendants in this particular case was rather stringent: see Davies, Trusts (1968) Annual Survey of Commonwealth Law 411 at 429. In this context, cf. Carl Zeiss Stiftung v. Herbert Smith & Co. (No. 2) [1969] 2 Ch. 276.

[85]Waters, The Law of Trusts in Canada 342 (1974).

[86](1873) L.R. 15 Eq. 204. See also, Wawanesa Mutual Insurance Co. v. Chalmers & Co. Ltd. (1969) 69 W.W.R. 612 (Sask. Q.B.).

[87]Nathan and Marshall, A Casebook on Trusts 310-311 (5th ed. 1967).

who, without receiving the trust property, has knowingly assisted the trustee in a fraudulent breach of trust, or has mixed himself up in the affairs of the trust by assuming to act as trustee. The latter is one who has actually received the trust property, or had it under his control. It is submitted that this suggestion is open to criticism on two counts. First the mere fact of receipt of the trust property is not determinative of the category into which the defendant should be placed; more important is the question whether the defendant was purporting to act on behalf of the trust, or in his own behalf.[88] Second, in any event, the better view is that a trustee de son tort is simply a type of constructive trustee. As Professor Pettit has said:[89]

> [T]he expression trustee de son tort . . . is not to be contrasted with a constructive trustee, but is an expression used to describe one type of constructive trust, namely, where a stranger has positively assumed to act as trustee.

The judgment of Ungoed-Thomas J. in Selangor United Rubber Estates Ltd. v. Cradock (No. 3)[90] supports this approach. Nevertheless, Ungoed-Thomas J. does say that: "It is essential . . . to distinguish two very different kinds of so-called constructive trustees. (i) Those who, though not appointed trustees, take on themselves to act as such

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[88]See e.g., Selangor United Rubber Estates Ltd. v. Cradock (No. 3) [1968] 2 All E.R. 1073, per Ungoed-Thomas J. at 1095.

[89]Pettit, Equity and the Law of Trusts 115 (2nd ed. 1970).

[90][1968] 2 All E.R. 1073 at 1095.

and to possess and administer trust property for the beneficiaries, such as trustees de son tort. . . . (ii) Those whom a court of equity will treat as trustees by reason of their action, of which complaint is made."[91] The learned judge therefore acknowledges that the trustee de son tort is but a type of constructive trustee, but suggests that the constructive trust has both a substantive and a remedial aspect, a point which he underlines by observing that his second category of constructive trusteeship "is nothing more than a formula for equitable relief."[92]

A practical manifestation of this distinction is apparent in the treatment accorded each category of constructive trustee under the Statutes of Limitations. Persons in the position of trustees de son tort are treated as if they were express trustees for the purposes of the Statutes; in other words, possession by the trustee is treated by the court as possession by the beneficiary, and therefore time does not run in favour of the trustee from the moment of possession.[93] On the other hand, "mere" constructive trustees, who claim to be acting in their own behalf, are entitled to the benefit of the Statutes.[94]

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[91] Id.

[92] Id. at 1097.

[93] See e.g., Gordon v. Ottawa [1953] 4 D.L.R. 542 (Ont. H.C.), McLellan v. Milne [1937] 3 D.L.R. 659 (Ont. S.C.).

[94] See e.g., Taylor v. Davies (1920) 51 D.L.R. 75 (P.C. on appeal from Ont. A.D.). See further, McCamus, Book Review (1973) 23 U. of T.L.J. 472 at 474.

V. ACQUISITION OF PROPERTY BY A FIDUCIARY

A. Introduction

In the preceding two sections we were concerned with situations where a constructive trust was imposed because of the wrongful acquisition or retention of property which was subject to an express trust. In the present section we shall see that a constructive trust may be imposed even where no express trust is involved, where property has been acquired or retained in breach of a fiduciary or quasi-fiduciary relationship.

B. Renewal of a Lease

The principle of Keech v. Sandford,[95] that a trustee who purports to renew in his own behalf a lease which was previously trust property shall be compelled to hold the benefit thereof for the beneficiaries of the express trust, has been extended in a modified form to situations involving the renewal of a lease by persons who, though not express trustees, are in a fiduciary or quasi-fiduciary relationship to the plaintiff. The case law in this area is rather confused. In some situations there is an irrebuttable presumption of law that the recipient may not take the benefit for himself, while in others there is "at most a rebuttable presumption of fact"[96] to that effect; however, the cases do not make clear which situations involve the former presumption, and which involve the latter.

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[95](1726) Sel. Cas. Ch. 61.

[96]Re Biss [1903] 2 Ch. 40, per Collins M.R. at 56.

The matter was discussed in some detail by two members of the English Court of Appeal in Re Biss,[97] but each expressed a different view, and in consequence the case "has called forth a variety of interpretations."[98] In that case John Biss, while in possession of certain business premises as a yearly tenant, died intestate. Letters of Administration were granted to the widow, and she with the two adult children continued to carry on the business under the existing yearly tenancy. The widow and the adult son each applied to the lessor for a new lease for the benefit of the estate, but their applications were refused. However, having determined the yearly tenancy by notice the lessor granted to the adult son "personally" a new lease for three years. The widow, as administratrix, then applied for an order that the son be required to hand over the lease agreement for the benefit of the estate, and for an account of the rents and profits received by him. At first instance, Buckley J. found as a fact that the lessor intended to renew the lease for the benefit of the son personally, and not for the benefit of the estate. Nevertheless, he felt himself bound by the decision in Ex parte Grace[99] to hold that the son must be treated as if he were a trustee of the lease for the estate. However, in the Court of Appeal it was held that Ex parte Grace[100] was not applicable, and that the son was entitled to keep the lease for himself.

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[97] Id.

[98] Waters, The Constructive Trust 32 (1964).

[99] (1799) 1 Bos. & P. 376.

[100] Id.

In the course of his judgment Collins M.R. expressed the view that the presumption of personal incapacity to benefit was irrebuttable in the case of persons standing in a fiduciary or quasi-fiduciary position.[101] In such a case the renewed lease was regarded in equity as a graft upon the original term, and the grantee of the renewed lease would be treated as holding it for the benefit of those persons who were beneficially interested in the original lease.[102] However, when no fiduciary or quasi-fiduciary relationship existed there was merely a rebuttable presumption of fact that the renewed lease should be held on a constructive trust.[103] Since the son in Re Biss[104] came within this second category he was "entitled to shew that the renewal was not in fact an accretion to the original term, and that it was not until there had been an absolute refusal on the part of the lessor, and after full opportunity to the administratrix to procure it for the estate if she could, that he accepted a proposal of renewal made to him by the lessor."[105]

Romer L.J. agreed that the son was not liable to the estate, but he differed from Collins M.R. in his account of the situations in which the presumption of personal incapacity to benefit was irrebuttable, and those where it was rebuttable. In his view, the presumption was

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[101] [1903] 2 Ch. 40 at 58.

[102] Id. at 56.

[103] Id.

[104] Id.

[105] Id. at 58.

irrebuttable in the case of persons standing in a fiduciary position, and persons, not being fiduciaries, who fraudulently represented that they were acting in the interests of those entitled to the old lease.[106] However, in a further category of cases where the person renewing the lease "[did] not clearly occupy a fiduciary position"[107] that person was held to be a constructive trustee of the new lease only if, in respect of the old lease, he occupied some "special position"[108] and owed, by virtue of that position, a duty towards the other persons interested. He concluded that the son in the instant case "was in no-wise in any fiduciary position in respect of the matter; he owed no duty to anyone in respect of it, he has been guilty of no fraud or concealment; and he has not used any right that a Court of Equity can recognise as belonging to other persons to enable him to obtain the lease."[109] Accordingly, the son was permitted to keep the lease for himself.

The problem with the judgments in Re Biss[110] is not merely that Collins M.R. and Romer L.J. used different terminology in describing the categories of persons who were affected respectively by the irrebuttable and the rebuttable presumptions. Even assuming that Collins M.R.'s "rebuttable presumption of fact" class is synonymous with Romer L.J.'s "special position" class an examination of the judgments reveals that

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[106] Id. at 60.

[107] Id. at 61.

[108] Id.

[109] Id. at 64.

[110] Id.

there was disagreement concerning which persons belonged in which class. Thus, while:[111]

> . . . both members of the court placed partners and the mortgagor and mortgagee in the special position class, Collins M.R. placed the tenant for life in his fiduciary or quasi-fiduciary class while Romer L.J. placed him in the special position class, and the joint tenant was in the special position class for Collins M.R. but under no duty at all for Romer L.J.

Despite this evident confusion, the judgments in the case are instructive insofar as they illustrate the point which was made earlier[112] about the vagueness of the fiduciary concept. While in the vast majority of cases the English and Canadian courts require the existence of a fiduciary or analogous relationship before imposing a constructive trust, there remains considerable uncertainty as to which persons may be properly described as "fiduciaries".

A Canadian case in which the requirement of a fiduciary relationship was held to have been satisfied is Pong v. Quong.[113] The appellant, Pong, and the respondent, Quong, had carried on a laundry business as partners at certain premises which the appellant had leased in his own name. Before the expiration of that lease the partnership was dissolved. Pong thereupon acquired a further lease on the property in

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[111] Waters, The Constructive Trust 32 (1964).

[112] Supra, Chapter One, at 12 et seq.

[113] [1927] 3 D.L.R. 128 (S.C.C.).

his own name, the term to commence at the expiration of the first term. Litigation followed, and it was ordered inter alia that Pong should assign the new lease to Quong in consideration of the sum of $600. The assignment was duly made, and provided that Quong might hold and enjoy the premises for the residue of the term granted by the lease "and for a renewal thereof (if any) for [his] own use and benefit without any interference of the assignor." The second lease did not in fact contain any provision for a renewal, and before the expiration thereof Pong obtained a new lease of the premises to commence at the expiration of the second lease. Quong then sued inter alia for a declaration that Pong was a trustee for him of the new lease. The Supreme Court of Canada, affirming the Appellate Division of the Ontario Supreme Court, upheld the claim. Anglin C.J.C., speaking for the Court, stated that:[114]

> . . . the transaction carried out by Pong was in breach of good faith and contravened his obligation with regard to renewals, which was implied in the whole arrangement between him and Quong. While there is no express right of renewal in the lease, the assignment of it does deal with renewal, and the allusion must be taken to refer to the reasonable expectation of the tenant in possession to obtain a renewal.

C. Other Acquisitions

It was earlier mentioned[115] that from the particular applications of Keech v. Sandford[116] to situations involving the renewal of a

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[114] Id. at 131.

[115] Supra, at 45.

[116] (1726) Sel. Cas. Ch. 61.

lease or the purchase of a freehold reversion there developed the more general principle that a trustee might not profit from his trust. This general principle is not confined to cases of express trusts. It applies to all cases in which one person stands in a fiduciary relationship to another, to prevent that person from using his fiduciary position in order to make a gain for himself.[117] Professor Waters has pointed out that in order for the principle to operate "[t]wo things must be established. First, that a fiduciary relationship existed between the parties at the time when the proprietary gain was made by the defendant, and, secondly, that that gain was made while the fiduciary was acting within the scope of his duties or was acquired, in cases of alleged undue influence, by pressures which his position enabled him to bring to bear."[118]

(1) Existence of Fiduciary Relationship

While the content of a fiduciary relationship is a question of law, the determination that a fiduciary relationship exists involves a careful examination of the facts of the case at hand. It appears that

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[117] See e.g., Stewart v. Molybdenum Mining and Production Co. (1921) 60 D.L.R. 497 (B.C.C.A.), McLellan v. Milne [1937] 3 D.L.R. 654 (Ont. S.C.), Follis v. Township of Albemarle [1941] 1 D.L.R. 178 (Ont. C.A.), McLeod v. Sweezey [1944] 2 D.L.R. 145 (S.C.C.), Pre-Cam Exploration and Development Ltd. v. McTavish (1966) 57 D.L.R. (2d) 557 (S.C.C.), Fern Brand Waxes Ltd. v. Pearl [1972] 3 O.R. 829 (Ont. S.C.A.D.), City of Edmonton v. Hawrelak (1973) 31 D.L.R. (3d) 498 (Alta. S.C.A.D.), Canadian Aero Service Ltd. v. O'Malley (1973) 40 D.L.R. (3d) 371 (S.C.C.).

[118] Waters, The Law of Trusts in Canada 344 (1974). cf. with the second of Waters's requirements, the comments of Laskin J. in Canadian Aero Service Ltd. v. O'Malley (1973) 40 D.L.R. (3d) 371 at 383, 390-391.

what the court is looking for is some inequality of footing between the parties which has enabled one party to take a wrongful advantage of the other.[119] The question is often a delicate one, especially in cases which arise in a commercial context. An example is provided by the Supreme Court of Canada decision in Canadian Western Natural Gas Co. Ltd. v. Central Gas Utilities Ltd.[120] Canadian Western, a subsidiary of the International Utilities Corporation, was competing with Central Gas for the franchise for the distribution of natural gas in the town of Vulcan. At the time, Central was heavily indebted to International. Pursuant to an agreement between the two companies, International also had acquired a substantial minority shareholding interest in Central, and had appointed its nominee to Central's board of directors. Central originally had been incorporated for the purpose of distributing propane gas in the town of Vulcan. Its interest in obtaining the franchise was that its gas distribution system could be used for delivering the natural gas. On the other hand, Canadian Western had built at its own expense a forty mile extension line in order to service the town of Vulcan and other municipalities in the vicinity of Vulcan. The franchise was awarded to Canadian Western and, after protracted negotiations, they also were able to buy from Central its gas distribution system. Central subsequently repudiated the arrangements, and claimed that Canadian Western should have actively promoted the acquisition of the franchise in the town of Vulcan for them, and that because of their position they must hold the

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[119] Follis v. Township of Albemarle [1941] 1 D.L.R. 178, per McTague J.A. at 181.

[120] Id. at 162.

franchise in trust for Central. The claim was rejected by the Supreme Court. Judson J., having examined the facts in detail, concluded:[121]

> [T]he purchase of the distribution system and the granting of the franchise were the result of hard bargaining at arm's length participated in not only by the two companies involved but by the town and with the knowledge of the board of public utility commissioners, which eventually approved both the sale and the grant of the franchise. There is no question here of the imposition of the will of the purchaser on a captive company. Any inferiority in the position of the [Central] Company was not the result of management or control by Canadian Western, but came from its total inability to make any contribution towards anything that would bring natural gas to the town.

Another case which was held ultimately to involve an arm's length transaction, and hence no fiduciary relationship, is Jirna Ltd. v. Mister Donut of Canada Ltd.[122] There, the defendant franchisor, unknown to the franchisee, had been receiving rebates from suppliers of raw materials with whom the franchisee in accordance with the terms of the franchise agreement was obliged to deal. At first instance,[123] Stark J. held that the close association of the franchisor and the franchisee had created a fiduciary relationship, and the obtaining of secret commissions by the franchisor was in breach of that relationship. On appeal, however, Brooke J.A. held that there was no inequality of footing between the parties which would justify the finding of a fiduciary relationship.

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[121] Id. at 162.

[122] (1973) 40 D.L.R. (3d) 303 (S.C.C.).

[123] [1970] 3 O.R. 629.

Hence there was no obligation to account: "The representatives of the respondent are businessmen of means and experience. . . . All of these men are engaged in professional or commercial life and are aware of the consequences of commercial contracts."[124] The Court of Appeal decision was affirmed on appeal to the Supreme Court.[125]

By way of contrast with these cases where a detailed examination of the facts was necessary in order to determine whether or not a fiduciary relationship existed, there are others where the default of the defendant was so clear that the court simply assumed, without stating, that the facts gave rise to a fiduciary relationship, and made the defendant liable as a constructive trustee. A case in point is Stewart v. Molybdenum Mining and Production Co.[126] There the plaintiff was co-owner of a mineral claim, (the "Conundrum" claim), in relation to which one Riel had agreed to carry out and record the necessary assessment work in order to keep the claim on foot. Riel failed to do the work as agreed, and thereby brought about the expiry of the claim. Subsequently, Riel and two associates re-staked the claim, along with other ground, as their own. They later incorporated the defendant company, and transferred the claims to it. The British Columbia Court of Appeal held that the defendant company held in trust for the original owners the interest in the ground which was formerly included in the Conundrum claim. Macdonald C.J.A. stated: "Having in mind the fact

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[124](1972) 3 C.P.R. (2d) 40 at 47.

[125](1973) 40 D.L.R. (3d) 303.

[126](1921) 60 D.L.R. 497 (B.C.C.A.) cf Hicks v. Hicks [1953] 4 D.L.R. 773, aff'd. id. at 777 (B.C.C.A.).

that it was Riel's default which brought about the loss of the "Conundrum" to its owners, the re-stakers must in equity be held to be trustees for these owners."[127] The same principle was applied by the Ontario Court of Appeal in Follis v. Albemarle.[128] Speaking for the Court, Masten J.A. there said that: "No-one can take advantage of a state of things produced by some unwarrantable act or default on his own part."[129]

(2) Was the Fiduciary acting within the scope of his Duties?

This is an aspect of a more general problem, which may be stated as follows: given that a fiduciary relationship exists, how far do the fiduciary obligations extend? The answer depends entirely on the circumstances of each case.[130] Not surprisingly, therefore, the outcome in any given case may be very difficult to predict. As a broad generality it may be said that the English courts appear to have taken a harder line in this area than have the Canadian courts. Thus, the English courts have said that the rule of equity that a fiduciary may not profit from his position as a fiduciary is an "inflexible" rule,[131] which is not dependent upon fraud or the absence of bona fides, but on

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[127](1921) 60 D.L.R. 497 at 499.

[128][1941] 1 D.L.R. 178.

[129]Id. at 186.

[130]See e.g., Canadian Aero Service Ltd. v. O'Malley (1973) 40 D.L.R. (3d) 371 (S.C.C.), per Laskin J. at 382-393, 390-391, (noted by Prentice, The Corporate Opportunity Doctrine (1974) 37 Mod. L. Rev. 464).

[131]Parker v. McKenna (1874) L.R. 10 Ch. 96, per James L.J. at 124-125.

the mere fact of a profit being made.[132] A fairly recent case which follows in this tradition is the widely discussed[133] decision of the House of Lords in Boardman v. Phipps.[134] There, the defendant solicitor, Boardman, and Tom Phipps, who was one of the beneficiaries of a family trust, had held themselves out as representing the trust, although they had not been formally appointed to do so. They thereby acquired information which enabled them to embark upon a course of action which not only increased the value of the trust holdings, but enabled them to make a handsome profit for themselves. Of the three formally appointed trustees, one was senile and was not consulted about the scheme, while the two others declined to become involved in it. In any event, they had no authority to do so. There was no question of dishonesty on the part of either Boardman or Tom Phipps. Nevertheless, they were held liable to account to the beneficiaries of the trust for the profits which they had made, on the basis that the knowledge which they had acquired by holding themselves out as agents of the trust was trust property, and furthermore, they had not made full disclosure to the beneficiaries.

The concept of knowledge as trust property was again raised in

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[132] See e.g., Regal (Hastings) Ltd. v. Gulliver [1942] 1 All E.R. 378, per Lord Russell of Killowen at 386.

[133] See e.g., Fridman, Agency and Secret Profits (1968) 3 Manitoba L. Rev. 17, Jones, Unjust Enrichment and the Fiduciary's Duty of Loyalty (1968) 84 L.Q. Rev. 472, Beck, The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered (1971) 49 Can. Bar Rev. 80, Sugarman, Seeing Through the Double-Dutch of Corporate Opportunity (1974) 52 Can. Bar Rev. 280.

[134] [1967] 2 A.C. 46.

the Canadian case of Pine Pass Oil and Gas Ltd. v. Pacific Petroleums Ltd.,[135] but this time the plaintiffs did not succeed. Pine Pass and Pacific were parties to a "carried interest agreement", under the terms of which Pine Pass assigned to Pacific "in trust" its beneficial interest in certain oil exploration permits in return for a 7 1/2% carried interest in the proceeds of sale of the oil and gas recovered "from so much of the said lands as shall at any time hereafter be comprised within any . . . lease or license issued pursuant to the provisions of the Permits. . . ." Pacific discovered oil and gas in commercial quantities in the permit area, and in accordance with the governing legislation selected one lease from the permit area for production. The consequence of this selection, as both parties knew, was to revest in the Crown a tract of land in the permit area one half mile wide, adjacent to the perimeter of the selected lease and completely surrounding it. This "Crown reserve", or "corridor acreage", was then put up for sale by public auction. Pacific was the highest bidder at the auction, and received fresh permits covering the areas in the corridor acreage purchased by it. In due course, leases were acquired and producing wells were brought in. Pine Pass brought action claiming a 7 1/2% interest in the net revenues from these corridor wells, claiming inter alia on the basis of a constructive trust. By virtue of the carried interest agreement, they argued, Pacific was in a fiduciary

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[135](1968) 70 D.L.R. (2d) 196 (B.C.S.C.). See also, Tombill Gold Mines Ltd. v. Hamilton (1956) 5 D.L.R. (2d) 561 (S.C.C.), Midcon Oil & Gas Ltd. v. New British Dominion Oil Co. (1958) 12 D.L.R. (2d) 705 (S.C.C.), Peso Silver Mines Ltd. v. Cropper (1966) 58 D.L.R. (2d) 1 (S.C.C.) cf. McLeod v. Sweezey [1944] 2 D.L.R. 145 (S.C.C.), Pre-Cam Exploration and Development Ltd. v. McTavish (1966) 57 D.L.R. (2d) 557 (S.C.C.).

relationship with them. Pacific used the information acquired in developing the permit area in bidding on the corridor acreage; but this information was "trust property" and should have been used for the benefit of the trust, and not for the personal benefit of Pacific. The claim was denied by Ruttan J. who based his decision on the expectations of the parties as revealed in the terms of the carried interest agreement:[136]

> I agree this case is unique in that a person acting in a fiduciary capacity in the proper conduct of the development of the property defined within the contract, acquired information useful both for developing the property inside the permit and the property lying outside but immediately adjacent thereto and which, in fact, was part of the permit area when the information was acquired. Nonetheless, in the contemplation of both parties that corridor acreage was to go outside of the permit area just as soon as the lease was selected, and would no longer be part of and governed by the terms of the contract.

Furthermore, under the terms of the agreement Pine Pass were not entitled to access to the information which had been developed by Pacific unless they elected to convert their "carried interest" into a "participating interest"; and they had not so elected.

Even in Boardman v. Phipps[137] it is acknowledged that at some stage it may be permissible for a person who has acquired knowledge in

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[136](1968) 70 D.L.R. (2d) 196 at 214.

[137][1967] 2 A.C. 46.

a fiduciary capacity to use it for his own advantage.[138] The problem is to determine where the line should be drawn. In the recent decision of Canadian Aero Service Ltd. v. O'Malley[139] Laskin J. cautioned that the answer does not lie in any verbal formula (though these formulae may provide useful guidelines), but in an exhaustive examination of the facts. However, it may well be that the differences that exist in this area go beyond the distinction in fact situations between one case and another, and represent a difference in attitude on the part of different courts towards the notion of strict accountability.[140]

(3) Stranger acting in concert with a fiduciary.

Just as a stranger to an express trust may be liable as a trustee de son tort, so may a stranger to a fiduciary relationship who either acted with the fiduciary, or received the profit knowing of the existence of the fiduciary obligation and the breach thereof. As Professor Waters has stated:[141]

> The characteristics of this trusteeship de son tort are the same as those . . . discussed in connection with express

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[138] See e.g., per Lord Cohen, id., at 102: "[I]it does not necessarily follow that because an agent acquired information and opportunity while acting in a fiduciary capacity he is accountable to his principals for any profit that comes his way as the result of the use he makes of that information and opportunity. His liability to account must depend on the facts of the case."

[139] (1973) 40 D.L.R. (3d) 371 at 382-383, 390-391.

[140] Waters, The Law of Trusts in Canada 347 (1974).

[141] Id. at 348.

> trusts. The would-be trustee de son tort must know of the fiduciary relationship when he acquires the profit in dispute, and he must have dominion or control or possession of it.

An example is provided by the decision in Morrison v. Coast Finance Ltd.[142] The facts, (somewhat simplified), were that the manager of the defendant finance company had assisted two clients of the company in persuading an aged widow of meagre means to mortgage her house to his company and loan the proceeds to the two clients. In so doing, he knew that a good portion of the money would be used by the clients to repay a debt owing to the defendant company. In fact, at the time of paying to the widow the proceeds of the mortgage he arranged for her to endorse the cheque over to them, and for them to return the cheque to him. At a later date, the widow successfully sued to have the mortgage set aside. The majority of the British Columbia Court of Appeal based their decision on the unconscionable nature of the whole transaction.[143] However, Sheppard J.A. suggested an alternative basis of liability.[144] He held that the two clients were in a fiduciary relationship with the plaintiff, since they had applied for the mortgage on her behalf, and were in breach of that relationship, since they had misrepresented to her the purpose for which the money was to be used. The manager had knowingly participated with these "trustees" in their breach of equitable duty, and in

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[142](1965) 55 D.L.R. (2d) 710 (B.C.C.A.). See also, Canada Safeway Ltd. v. Thompson (1951) 3 D.L.R. 295.

[143](1965) 55 D.L.R. (2d) 710, per Davey J.A. at 714.

[144]Id. at 722.

fact had received the fruits of that breach on behalf of the defendant company, and therefore, the company became liable to account to the plaintiff.

VI. ACQUISITION OF PROPERTY BY FRAUD

A. Actual Fraud and Constructive Fraud

It has long been maintained that where one person has acquired property in consequence of his fraud upon another, that person will be liable as a constructive trustee for the benefit of the person who has been injured by the fraud.[145] As Professor Sheridan has shown,[146] the term "fraud" is used to cover a wide variety of conduct. At common law, fraud is limited basically to those situations involving a fraudulent misrepresentation, i.e., a false statement of fact, made by the defendant to the plaintiff knowingly, or without belief in its truth, or recklessly, with the intent that it should be acted upon; which is in fact acted upon by the plaintiff.[147] Equity also recognises this "actual fraud", but in addition is prepared to remedy situations involving "constructive fraud"[148] - a term which is not readily susceptible of definition, but which may be taken to include "all conduct

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[145] See e.g., McCormick v. Grogan (1869) L.R. 4 H.L., per Lord Westbury at 97.

[146] Sheridan, Fraud in Equity (1957).

[147] Snell, Principles of Equity 543 (27th ed. Megarry and Baker 1973).

[148] See generally, id. at 545-560.

which equity treats as unfair, unconscionable, and unjust."[149]

Used in this broad sense, the idea of "fraud prevention" may be seen to pervade virtually the whole field of constructive trusts. Thus, fraud is specifically mentioned as an element in many of the cases just discussed involving the making of an unauthorised profit by a fiduciary. In fact, the fraudulent act itself may be held to create the fiduciary relationship[150] - a matter of some significance, as we shall shortly see. Again, the idea of "fraud prevention" underlies the "undue influence" cases, a recent Canadian example being found in Public Trustee v. Skoretz.[151]

B. Criminal Profiting from his Crime

Other cases which may be fairly described as involving unconscionable conduct are those where a criminal seeks to profit from his crime. In Cleaver v. Mutual Reserve Fund Life Association,[152] a husband, who had earlier effected an insurance on his life for the benefit of his wife, was murdered by her. The issue was whether the insurance company was liable on the policy, and if so, whether the proceeds should be paid to the assignee of the wife, or to the deceased husband's executors.

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[149] Bogert, Trusts and Trustees Para. 471 (2nd ed. 1961).

[150] See e.g., Stewart v. Molybdenum Mining and Producting Co. (1921) 60 D.L.R. 497 (B.C.C.A.), Fraser v. Fraser [1933] 2 D.L.R. 513 (S.C.C.), Follis v. Township of Albemarle [1941] 1 D.L.R. 178 (Ont. C.A.), Bannister v. Bannister [1948] 2 All E.R. 133 (C.A.).

[151] [1973] 2 W.W.R. 638 (B.C.S.C.). See also Stapleton, The Presumption of Undue Influence (1967) 17 U.N.B.L.J. 46.

[152] [1892] 1 Q.B. 147. See also Re Crippen [1911] P. 108.

Under the Married Women's Property Act, 1882, section 11, a policy of insurance effected by any man for the benefit of his wife created a trust in her favour, and the moneys payable under the policy were declared not, so long as any object of the trust remained unperformed, to form part of the insured's estate or to be subject to his debts. The court held that it was against public policy to allow a criminal to claim any benefit by virtue of his crime, and that in view of the facts "the language of the statute must be read as if it contained an exception of such a case."[153] Accordingly, the statutory trust was held to be unenforceable by the wife or anyone claiming through her, and the money was directed to be paid to the executors of the deceased. On the other hand, in Schobelt v. Barber,[154] it was suggested that a preferable solution would be to impose a constructive trust in order to prevent the wrongdoer from enjoying the benefit acquired by his crime. This approach has the advantage of not conflicting with the legislature or with other established principles of law, since it accepts that the wrongdoer has gained title to the property, but then prevents his enjoyment of that title.[155] In that case, therefore, a constructive trust was imposed on the guilty husband, compelling him to hold the property which he had acquired by right of survivorship upon the murder of his wife for the benefit of her heirs or devisees.

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[153][1892] 1 Q.B. 147, per Fry L.J. at 158.

[154](1967) 59 D.L.R. (2d) 519 (Ont. H.C.).

[155]See further, Youdan, Acquisition of Property by Killing (1973) 89 L.Q. Rev. 235 at 253.

C. Secret Trusts.

Other situations in which it has been suggested that a constructive trust is imposed in order to prevent fraudulent or unconscionable behaviour include the "secret trust"[156] cases, and those where an interest in land is acquired inter vivos pursuant to an oral agreement on the part of the transferee to hold either for the benefit of the transferor or for some third party.[157]

With respect to secret trusts, it was held at a very early stage that these were constructive trusts which were imposed by the courts in order to prevent fraud in accordance with the maxim that "Equity will not allow a statute to be used as an instrument of fraud."[158] The gist of these early decisions was that secret trusts were testamentary in nature, but that despite their non-compliance with

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[156] The expression is used here to refer to the cases where properly belonging to the promisee passes on his death to the promisor pursuant to an informal arrangement between them that the promisor will hold the land for the benefit of some third party. A distinction is normally drawn between "those cases where the legatee or intestate successor has accepted a trust imposed upon him, though the existence of such trust is not disclosed in the testamentary instrument if any, [i.e., "fully secret" trusts]; and . . . cases where the will itself manifests the testator's intention to create a trust, though its terms are not therein ascertained, [i.e., "half secret" trusts].": Fleming, Secret Trusts (1947) 12 Conv. (N.S.) 28 at 28-29.

[157] See e.g., Davies v. Otty (No. 2) (1865) 35 Beav. 208, Haigh v. Kaye (1872) L.R. 7 Ch. App. 469, Booth v. Turle (1873) L.R. 16 Eq. 182, Re Duke of Marlborough [1894] 2 Ch. 133, Rochefoucauld v. Boustead [1897] 1 Ch. 196, Bannister v. Bannister [1948] 2 All E.R. 133.

[158] See e.g., McCormick v. Grogan (1869) L.R. 4 H.L. 82, per Lord Westbury at 97.

the formalities of the Wills Act[159] the trusts would be enforced in order to prevent the recipient of the property from using it for his own benefit. However, it is now accepted that secret trusts operate completely outside the Wills Act, a validly executed will (where there is a will) being necessary only for the transfer of the property into the hands of the secret trustee.[160] Given this explanation of the operation of secret trusts, it will be seen that the formality requirements of the Wills Act are only incidentally relevant to their enforceability. The problem is, that the cases which tell us that secret trusts operate outside the will do not provide a satisfactory explanation of the basis upon which they are enforced. The question becomes important when considering the enforceability of a secret trust relating to land: does there need to be evidence in writing of the trust, signed by the party to be charged, as required by section 7 of the Statute of Frauds;[161] or can the trust be proved by parol evidence? In other words, what is the juridical nature of secret trusts - are they express trusts or constructive trusts?

In Blackwell v. Blackwell,[162] Viscount Sumner, having asserted that secret trusts were not testamentary trusts, nevertheless re-affirmed that they were constructive trusts imposed by the court in order to

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[159] In Alberta, see The Wills Act (R.S.A. 1970, c. 393) section 5.

[160] See e.g., Blackwell v. Blackwell [1929] A.C. 318, per Viscount Sumner at 334 (fully secret trust), Re Young [1951] Ch. 344, per Danckwerts J. at 351.

[161] 29 Car. II, c. 3.

[162] [1929] A.C. 318 (H.L.).

prevent fraud:[163]

> For the prevention of fraud equity fastens on the conscience of the legatee a trust, a trust, that is, which otherwise would be inoperative; in other words it makes him do what the will in itself has nothing to do with; it lets him take what the will gives him and then makes him apply it, as the Court of conscience directs, and it does so in order to give effect to wishes of the testator, which would not otherwise be effectual.

There are difficulties with this reasoning, however. For example, in the case of a fully secret trust where the secret trustee reveals the existence of the trust,[164] the only question for the court is the proper destination of the property as between two apparently innocent third parties: the beneficiaries under the terms of the secret trust, and the residuary legatees (or, where there is no will, those entitled to take upon an intestacy).[165] Again, in the case of a half secret trust, where the existence of the trust is spelled out in the will, it is clear that the recipient of the property under the terms of the will cannot claim to be holding for his own benefit.[166] In neither of these cases, therefore, is there any question of the trustee using the trust property for his own benefit. There is another matter. The

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[163] Id. at 335.

[164] See e.g., Re Boyes (1884) 26 Ch. D. 531.

[165] Burgess, The Juridical Nature of Secret Trusts (1972) 23 N.I.L.Q. 263 at 266.

[166] Re Rees [1950] Ch. 204.

usual remedy in cases of equitable fraud is restitutio in integrum. Since the donor has died, the closest approximation to restitution in these cases would be to declare that the secret trustee is holding in trust for those who would have taken the property had the donor not arranged for it to fall into his hands. However, except where the trustee himself claims to be the beneficiary,[167] the trust is always enforced onwards in favour of the beneficiaries. Why should this be?

The most obvious explanation is that the courts in these cases are simply enforcing the express agreement which was made during the donor's lifetime in order to give effect to his intentions, notwithstanding the requirements of the statute.[168] However, the judicial explanation which is usually given is that a failure to carry out the intentions of the donor,[169] notwithstanding that they have been informally expressed, would be a fraud on the donor, and a constructive trust in the terms of the informal agreement is imposed in order to prevent such fraud.[170] In accordance with this broad concept of fraud it is no less a fraud to permit the residuary legatees to take in the

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[167] Id.

[168] Waters, The Constructive Trust 59-60 (1964), Waters, The Law of Trusts in Canada 350 (1974).

[169] Assuming, of course, that the rules relating to communication of his wishes to, and acquiescence in them by, the secret trustee have been complied with: see e.g., Hayman v. Nicoll [1944] 3 D.L.R. 551 (S.C.C.), per Rand J. at 558.

[170] See e.g., Ottaway v. Norman [1972] 2 W.L.R. 50, per Brightman J. at 57 et seq.

Re Boyes[171] type of situation than it is to permit a secret trustee to retain the benefit for himself.[172] In other words, "fraud", so defined, enables the courts at will to turn the Statute of Frauds against itself,[173] in order to achieve the desired equitable result. There is no doubt, however, that the practice is hallowed by usage.

D. Informal Inter Vivos Transfers

Similar problems arise in the cases dealing with inter vivos transfers pursuant to an oral arrangement between the transferor and the transferee that the latter will hold for the benefit of the former or for some third party. For example, in Davies v. Otty (No. 2),[174] where the transferee in contravention of an oral arrangement refused to re-transfer the land and attempted to set up the Statute of Frauds the court enforced the arrangement by imposing a constructive trust. On the other hand, in Rochefoucauld v. Boustead,[175] where the plaintiff claimed that the defendant had taken a transfer of certain lands formerly standing in her name, on the basis of an oral agreement that he would

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[171](1884) 26 Ch. D. 531. See text supra at footnote 164.

[172]See e.g., Wallgrave v. Tebbs (1855) 2 K. & J. 313.

[173]i.e., by using section 8, which exempts constructive trusts from the requirement of writing, to the exclusion of section 7.

[174](1865) 35 Beav. 208. See also, Scheuerman v. Scheuerman (1916) 28 D.L.R. 223 (S.C.C.), per Duff J. at 230; but cf Langille v. Nass (1917) 36 D.L.R. 368 (N.S.S.C.), where the constructive trust was enforced onwards in favour of the beneficiaries.

[175][1897] 1 Ch. 196. See also, Brown v. Storoschuk [1947] 1 D.L.R. 227 (B.C.C.A.).

hold it in trust for her during her financial difficulties, the Court enforced the agreement as an express trust, notwithstanding section 7 of the Statute of Frauds.

An important case in this area is Bannister v. Bannister.[176] There, the defendant owned two adjacent cottages which she was negotiating to sell to the plaintiff, her brother-in-law. As one of the terms of the sale it was orally agreed between the parties that the defendant could continue to live in one of the cottages rent free for as long as she wished. In return, the plaintiff was able to negotiate a purchase price which was substantially lower than the prevailing market value of the cottages. No mention was made of this agreement in the formal conveyance. Subsequently, the plaintiff brought action against the defendant to recover possession of the cottage in which she was living. The defendant counterclaimed for a declaration that the plaintiff held the cottage in trust for her for her life. The plaintiff sought to rely on the absence of writing required by the Law of Property Act, 1925, for the creation of such an interest. However, the Court of Appeal found in favour of the defendant, and imposed a constructive trust in her favour upon the plaintiff. Scott, L.J., who delivered the judgment of the court, said in part:[177]

> It is, we think, clearly a mistake to suppose that the equitable principle on which a constructive trust is raised against a person who insists on the absolute character of a conveyance to himself for the purpose of defeating

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[176] [1948] 2 All E.R. 133 (C.A.).

[177] Id. at 136.

> a beneficial interest, which, according to the true bargain, was to belong to another, is confined to cases in which the conveyance itself was fraudulently obtained. The fraud which brings the principle into play arises as soon as the absolute character of the conveyance is set up for the purpose of defeating the beneficial interest, and that is the fraud to cover which the Statute of Frauds or the corresponding provisions of the Law of Property Act, 1925, cannot be called in aid in cases in which no written evidence of the real bargain is available. Nor is it, in our opinion, necessary that the bargain in which the absolute conveyance is made should include any express stipulation that the grantee is in so many words to hold as trustee. It is enough that the bargain should have included a stipulation under which some sufficiently defined beneficial interest in the property was to be taken by another.

It will be recalled that in the earlier cases in which an informal arrangement had been enforced by the courts the arrangement had either spelled out an express trust, or the court had been prepared to treat it as creating a trust obligation.[178] The decision in Bannister[179] is significant because the court held that it was not necessary, in order for a constructive trust to be imposed, that it should be able to construe the arrangement itself as creating a trust. Scott L.J. spoke of the trust arising at the stage when the transferee attempted to set up the absolute nature of the conveyance against the

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[178] See e.g., Haigh v. Kaye (1872) L.R. 7 Ch. App. 469, Booth v. Turle (1873) L.R. 16 Eq. 182, Re Duke of Marlborough [1894] 2 Ch. 133.

[179] Bannister v. Bannister [1948] 2 All E.R. 133.

claim of the transferor. Accepting on the basis of existing authority[180] that a fiduciary relationship is necessary before a constructive trust can be imposed, Scott L.J. is saying therefore that the fiduciary relationship may be created by the unconscionable act itself. In other words, here we see quite clearly the constructive trust being used as a remedial device--the emphasis is on the nature of the defendant's act, and not on the breach of a pre-existing fiduciary relationship.[181]

In the following Chapter it is proposed to examine some more recent English cases which have taken up this idea of the remedial constructive trust, and also to examine some Canadian cases which appear to be receptive to the same idea.

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[180] Re Diplock [1948] Ch. 465.

[181] See Chapter One, supra, text at footnote 46.

CHAPTER THREE

THE DEVELOPMENT OF A REMEDIAL CONSTRUCTIVE TRUST

I. ENGLISH DEVELOPMENTS

A. Decisions Following Bannister v. Bannister[1]

Contrary to the suggestion which was made at the end of the previous Chapter that the Court of Appeal in Bannister v. Bannister[2] employed the constructive trust as a remedial device, most commentators[3] seem to have assumed that the agreement itself was construed by the court as creating a trust, and in accordance with that assumption have regarded the decision merely as another in the line of decisions[4] in which proof of an oral agreement was permitted in order to prevent a fraud upon a statute.[5] That the implications of the decision were

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[1][1948] 2 All E.R. 133.

[2]Id.

[3]See e.g., Hanbury, Modern Equity 235 (9th ed. Maudsley 1969), Parker and Mellows, The Modern Law of Trusts 42 (2nd ed. 1970), Pettit, Equity and the Law of Trusts 56 (2nd ed. 1970), Snell, Principles of Equity 106 (27th ed. Megarry and Baker 1973), Oakley, Has the Constructive Trust Become a General Equitable Remedy? (1973) 26 Current Legal Problems 17 at 23, Smith, Licences and Constructive Trusts--"The Law is What it Ought to be" (1973) 32 Camb. L.J. 123 at 143. But cf. Waters, The Constructive Trust 62 (1964).

[4]See e.g., Haigh v. Kaye (1872) L.R. 7 Ch. App. 469, Booth v. Turle (1873) L.R. 16 Eq. 182, Re Duke of Marlborough (1894) 2 Ch. 133.

[5]Law of Property Act, 1925, sections 53 and 54.

broader than has been generally recognized is borne out by the decision in Neale v. Willis.[6] Moreover, the Court of Appeal in that case took advantage of an additional matter which was raised in Bannister v. Bannister:[7] while Bannister on its facts was concerned with a "two party" situation, i.e., where the beneficiary under the trust and the original transferor were one and the same person, the language of Scott L.J.[8] was wide enough to cover a "three party" situation, i.e., where the beneficiary under the trust was someone other than the original transferor; and Neale v. Willis[9] involved just such a situation.

The facts of the case were as follows. The defendant borrowed money from his mother-in-law to put towards the purchase of a house, on the basis of a promise that the house would be purchased in the joint names of himself and the plaintiff, who was then his wife. The defendant in fact, without disclosing the matter to his mother-in-law or to the plaintiff, took the conveyance in his name alone. Some years later, the plaintiff and the defendant were divorced. After the divorce the plaintiff sought a declaration that the property was owned by the defendant and herself in equal shares. The Court of Appeal upheld the plaintiff's claim, and declared that the defendant held the property on a constructive trust for himself and his former wife jointly. The

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[6](1968) 19 P.& C.R. 836.

[7][1948] 2 All E.R. 133.

[8]Id. at 136; "It is enough that the bargain should have included a stipulation under which some sufficiently defined beneficial interest in the property was to be taken by another." (Emphasis added.)

[9](1968) 19 P. & C.R. 836.

leading judgment was delivered by Lord Denning M.R., who stated in part:[10]

> The agreement by the husband with the mother-in-law, Mrs. Gething, was a perfectly good agreement. It was an agreement for the benefit of the wife--a third person-- and was binding on the husband. That is clear from the decision of the House of Lords in Beswick v. Beswick.[11] It could clearly be enforced by Mrs. Gething by specific performance. Mr. Bowyer objects that Mrs. Gething--the contracting party--is not a party to these proceedings. He distinguishes Beswick v. Beswick[12] on the ground that there the action for specific performance was brought by the party to the contract, whereas the action here is brought by the third person, the wife. I am not impressed by this distinction. This was a binding contract and the Court of Equity will not allow the husband to go back on it. It will enforce it by holding that the husband holds the property on a constructive trust for himself and his wife. This follows from Bannister v. Bannister.[13] That case shows that if a person who takes a conveyance to himself, which is absolute in form, nevertheless has made a bargain that he will give a beneficial interest to another, he will be held to be a constructive trustee for it for the other. He cannot insist on the absolute character of a conveyance to himself for the purpose of defeating a beneficial interest which according to the true bargain is to belong to another. So here we have a husband who is seeking to insist on the absolute character of the conveyance to himself and to him alone. He does it for the purpose of defeating a beneficial interest which according to the true bargain was to belong to

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[10] Id. at 839.

[11] [1968] A.C. 58.

[12] Id.

[13] [1948] 2 All E.R. 133.

> his wife. He holds it on a constructive trust to carry out the bargain. Seeing that there was a constructive trust, there is no need for any writing. Section 53 of the Law of Property Act 1925 does not affect the operation of a constructive trust.

Lord Denning M.R., therefore, accepted that the defendant was in breach of a contractual, and not a trust arrangement; but, basing himself on Bannister v. Bannister,[14] he invoked a remedial constructive trust to overcome the privity problem and grant relief to the plaintiff. In enforcing the agreement onwards in favour of the wife Lord Denning M.R. went beyond a theory of unjust enrichment, which operates to work a restitutio in integrum. The constructive trust was employed to do indirectly (i.e., enforce the agreement) what, because of a procedural deficiency, could not be done directly.

In similar vein, in the recent decision in Binions v. Evans,[15] Lord Denning M.R. invoked a constructive trust to ensure that the defendant received the benefit of an agreement which had been entered into for her protection between the plaintiffs and certain third parties, when the plaintiffs subsequently attempted to ignore the agreement. Unlike Bannister v. Bannister,[16] and Neale v. Willis,[17] there was no problem here created by an absence of writing: the question was simply whether, and if so, how, the plaintiffs would be made to honour the terms

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[14] Id.

[15] [1972] Ch. 359. See also Smith, Licences and Constructive Trusts--"The Law is What it Ought to be" (1973) 32 Camb. L.J. 123.

[16] [1948] 2 All E.R. 133.

[17] (1968) 19 P. & C.R. 836.

of the agreement. Once again, Lord Denning M.R. fastened on the unconscionable nature of the plaintiffs' conduct as a basis for imposing a constructive trust. The facts were as follows. Mrs. Evans was the widow of a long time employee of the Tredegar Estate. After the death of her husband, and when she was 76 years of age, the trustees of the Estate entered into an agreement with her whereby she was permitted to reside in a cottage on the Estate "as a tenant at will of them free of rent for the remainder of her life or until determined as hereinafter provided." The agreement provided for termination of the tenancy by Mrs. Evans, but said nothing about termination by the trustees. The final clause stated that "the tenancy hereby created shall unless previously determined forthwith determine on the death of the tenant." The Tredegar Estate subsequently agreed to sell the cottage to the plaintiffs, Mr. & Mrs. Binions. The trustees gave the plaintiffs a copy of the tenancy agreement which had been entered into with Mrs. Evans, and in the contract for sale inserted a clause making the sale subject to her rights. By reason of that provision the plaintiffs paid a reduced price for the cottage. Six months after the sale was completed the plaintiffs gave notice to Mrs. Evans, and claimed possession of the property in the county court. Both at trial and in the Court of Appeal there was general agreement that the plaintiffs should not be allowed to succeed; but different reasons were given. Megaw and Stephenson L.JJ.[18] citing Bannister v. Bannister,[19] held that by virtue of the agreement between herself and the trustees Mrs. Evans had an

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[18][1972] Ch. 359 at 370 and 372, respectively.

[19][1948] 2 All E.R. 133.

equitable life interest and was a tenant for life under the Settled Land Act, 1925. The plaintiffs held the cottage on trust to permit her to occupy it "during her life or as long as she lives,"[20] and subject thereto, in trust for them. However, Lord Denning M.R. took a different approach. He held that upon a proper construction of the agreement no tenancy was established. Rather, Mrs. Evans had a contractual licence, which gave her an equitable interest in the land,[21] and this interest the Court would protect by granting an injunction against the trustees restraining them from turning her out. He went on to say that even if Mrs. Evans did not have an equitable interest at the outset, she certainly acquired one when the trustees sold the cottage to the plaintiffs subject to her rights under the agreement:[22]

> [The trustees] stipulated with the plaintiffs that they were to take the house "subject to" the defendant's rights under the agreement. They supplied the plaintiffs with a copy of the contract: and the plaintiffs paid less because of her right to stay there. In these circumstances, this Court will impose on the plaintiffs a constructive trust for her benefit: for the simple reason that it would be utterly inequitable for the plaintiffs to turn the defendant out contrary to the stipulation subject to which they took the premises. That seems to me clear from the important decision of Bannister v. Bannister[23] . . . .

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[20] [1972] Ch. 359 at 372, per Stephenson L.J., quoting the Trial Judge, Judge Bulger.

[21] Id. at 368. cf. Smith, Licences and Constructive Trusts--"The Law is What it Ought to be" (1973) 32 Camb. L.J. 123 at 135.

[22] [1972] Ch. 359 at 368.

[23] [1948] 2 All E.R. 133.

> I know that there are some who have doubted whether a contractual licensee has any protection against a purchaser, even one who takes with full notice[24]. . . . None of these doubts can prevail, however, when the situation gives rise to a constructive trust. Whenever the owner sells the land to a purchaser, and at the same time stipulates that he shall take it "subject to" a contractual licence, I think it plain that a court of equity will impose on the purchaser a constructive trust in favour of the beneficiary. It is true that the stipulation . . . is . . . for the benefit of one who is not a party to the contract of sale; but, as Lord Upjohn said in Beswick v. Beswick[25]. . . . that is just the very case in which equity will "come to the aid of the common law." It does so by imposing a constructive trust on the purchaser. It would be utterly inequitable that the purchaser should be able to turn out the beneficiary.

In further support of the concept of a remedial constructive trust Lord Denning M.R. cited dicta from two well known authorities, one American and one English.[26] From the judgment of Cardozo J. in Beatty v. Guggenheim Exploration Co.[27] he adopted the statement that: "A constructive trust is the formula through which the conscience of equity finds expression"; and from the speech of Lord Diplock in Gissing v. Gissing,[28] the statement that a constructive trust is created

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[24]Citing Wade, Licences and Third Parties (1952) 68 L.Q. Rev. 337, Re Solomon [1967] Ch. 573. See also, National Provincial Bank Ltd. v. Ainsworth [1965] A.C. 1175, Crane, Estoppel Interests in Land (1967) 31 Conv. (N.S.) 332.

[25][1968] A.C. 58 at 98.

[26][1972] Ch. 359 at 368.

[27](1919) 225 N.Y. 380 at 386.

[28][1971] A.C. 886 at 905.

"whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired." The suggestion that the American and English positions on the nature of the constructive trust are the same represents a characteristically bold move by Lord Denning M.R. It appears to be borne out by the words quoted from Lord Diplock in the Gissing[29] case; but, as will be shortly discussed, there is some dispute as to the significance of this passage. However, before turning to consider the "matrimonial property" cases, of which Gissing v. Gissing[30] is one, attention should be drawn to the recent Court of Appeal decision in Hussey v. Palmer,[31] where once again Lord Denning M.R. took the opportunity to develop his views on the matter of the remedial constructive trust.

The facts were that the plaintiff, an elderly widow, was invited by her daughter and son-in-law, the defendant, to live in their house. A bedroom was built on as an extension for the plaintiff, she paying the cost of the extension, £607, directly to the builder. At the time, nothing was said by any of the parties about repayment of the money, and it appears likely that little, if any, thought was given to the matter. The assumption on both sides appears to have been that the plaintiff would live at the house until her death, whereupon the defendant would become beneficially entitled to the extension. However,

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[29] Id.

[30] Id.

[31] [1972] 1 W.L.R. 1286. See also Strathy, The Constructive Trust as a Restitutionary Remedy: The case of Hussey v. Palmer (1974) 32 U. of T. Faculty of Law Review 83, Note (1973) 89 L.Q. Rev. 2.

differences arose between the plaintiff and her daughter, and as a result, after about 15 months, the plaintiff moved out of the house. The plaintiff then claimed the cost of the extension from the defendant, arguing at various stages[32] on the basis of a loan and a resulting trust. The defense was that the payment was in the nature of a gift. In the Court of Appeal, the claim was put on the basis of a resulting trust, and was upheld by Lord Denning M.R. and Phillimore L.J., Cairns L.J. dissenting.[33] The leading judgment for the majority was delivered by Lord Denning M.R. who said in part:[34]

> Although the plaintiff alleged that there was a resulting trust, I should have thought that the trust in this case, if there was one, was more in the nature of a constructive trust: but this is more a matter of words than anything else. The two go together. By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded upon large principles of equity, to be applied in cases where the legal owner cannot conscientiously keep the property for himself alone, but ought to

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[32] See [1972] 1 W.L.R. 1286, per Lord Denning M.R. at 1288-1289 for an account of the previous proceedings.

[33] Id. at 1292. Cairns L.J. agreed with the Trial Judge that the plaintiff had failed to establish the cause of action which he had set up. He held that this was a case of a loan, which would put the parties in the relationship of creditor and debtor, and not of cestui que trust and trustee. (See further Underhill, Law of Trusts and Trustees 210 (12th ed. 1970), Waters, The Doctrine of Resulting Trusts in Common Law Canada (1970) 16 McGill L.J. 187 at 195.) Had it not been for the view taken by the two other members of the Court, Cairns L.J. would have been prepared to allow the plaintiff to amend her pleadings and have the matter retried; but in the event, this course was unnecessary.

[34] [1972] 1 W.L.R. 1286 at 1289-1290.

> allow another to have the property or the benefit of it or a share in it. The trust may arise at the outset when the property is acquired, or later on, as the circumstances may require. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.

In the result, Lord Denning M.R. and Phillimore L.J. held that the plaintiff was entitled to an interest in the property proportionate to her contribution of £607, thereby giving the decision a distinctly American flavour.[35] The plaintiff, however, was content to be repaid the sum which she had actually paid out, and nothing more.

Presumably in this case the court could have invoked the equitable maximum that "Equity presumes bargains and not gifts," and found in favour of the plaintiff on the basis of well-established resulting trust principles.[36] There was no need to resort to the remedial constructive trust at all. However, the opportunity to do so was evidently welcomed. The suggestion by Lord Denning M.R. that the trust may arise at the outset, when the property is acquired, or subsequent to the acquisition of the property, as the circumstances may require, echoes the view which had been earlier put forward by Scott L.J. in the Bannister[37] case, although Bannister was not directly mentioned. In further support of his decision Lord Denning M.R. referred to Binions

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[35] See e.g., Waters, Law of Trusts in Canada 336 (1974).

[36] See e.g., Lesser, The Acquisition of Inter Vivos Matrimonial Property Rights in English Law: A Doctrinal Melting Pot (1973) 23 U. of T. L.J. 148 at 202, Waters, The Doctrine of Resulting Trusts in Common Law Canada (1970) 16 McGill L.J. 187 at 194 et seq.

[37] [1948] 2 All E.R. 133 at 136.

v. Evans,[38] and also to several of the "matrimonial property" cases[39] in which the Gissing[40] decision had been treated as acknowledging the existence of a remedial constructive trust.

B. The Matrimonial Property Cases

In addition to the decisions just discussed which developed the idea of a remedial constructive trust from the judgment of Scott L.J. in Bannister v. Bannister,[41] attention should be drawn to the line of cases, which are here called the "matrimonial property" cases, which developed the idea of a remedial constructive trust from the statement of Lord Diplock in Gissing v. Gissing[42] that:

> A resulting, implied or constructive trust --and it is unnecessary for present purposes to distinguish between these three classes of trust--is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired.

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[38] [1972] Ch. 359.

[39] Heseltine v. Heseltine [1971] 1 All E.R. 952 (C.A.), Falconer v. Falconer [1970] 3 All E.R. 499 (C.A.), Cooke v. Head [1972] 2 All E.R. 38 (C.A.) (which involved a claim by a mistress, and not a wife).

[40] [1971] A.C. 886.

[41] [1948] 2 All E.R. 133.

[42] [1971] A.C. 886 at 905.

It was earlier mentioned[43] that some doubts have been expressed as to whether in fact Lord Diplock by this statement intended to lend support to the concept of a remedial constructive trust, and in order to attempt an assessment of the significance of the statement it is proposed to give a brief background to the Gissing[44] case.

The facts of all the matrimonial property cases fit the same general pattern: on the breakdown of the marriage one of the parties claims to be entitled, by virtue of contributions of a direct or indirect nature, to a beneficial interest in property, usually the matrimonial home, the legal title to which is in the sole name of the other. Normally, of course, while the marriage is going well, no thought is given by the parties to where the beneficial interest in the assets of the marriage lies. Property, although perhaps separately acquired, is simply used in common. On the breakdown of the marriage, however, the question of which property "belongs" to which spouse becomes significant; and at this stage, problems may arise. Traditionally, these claims have been settled by an application of the ordinary rules of property law as modified by resulting trust principles, including the presumptions of resulting trust and advancement.[45] In more recent times, however, the adequacy of these rules has come into question. Given modern social conditions, where very often both spouses are working in order to improve

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[43] Supra, Chapter One at 31, footnote 101.

[44] [1971] A.C. 886.

[45] These rules are conveniently stated in The Law Commission, Published Working Paper No. 42: Family Property Law 53 et seq (October, 1971). See also Bromley, Family Law 375 et seq (4th ed. 1971).

the economic position of the family unit, it became apparent to the courts that an application of the traditional rules was not necessarily synonymous with "doing justice" between the parties. In response to the problem, a line of decisions in the English Court of Appeal[46] developed the doctrine of "family assets", which held basically that where both spouses were contributing to the general expenses of the family, this was evidence from which the court could infer an implied pooling agreement or joint venture, and accordingly the spouses should share the beneficial interest in the "family assets" acquired from the pool irrespective of where the legal interest lay.[47] Not surprisingly, as the Law Commission[48] has pointed out, some of these decisions were difficult to reconcile with established property law principles; and in Pettitt v. Pettitt[49] and Gissing v. Gissing[50] the House of Lords put an

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[46] See e.g., Rimmer v. Rimmer [1953] 1 Q.B. 63, Fribance v. Fribance [1957] 1 All E.R. 357. The doctrine of "family assets" was never accepted in Canada: see Thompson v. Thompson [1961] S.C.R. 3, per Judson J. at 13-14.

[47] "It comes to this: where a couple, by their joint efforts, get a house and furniture, intending it to be a continuing provision for them for their joint lives, it is the prima facie inference from their conduct that the house and furniture is a "family asset" in which each is entitled to an equal share. It matters not in whose name it stands: or who pays for what: or who goes out to work and who stays at home. If they both contribute to it by their joint efforts the prima facie inference is that it belongs to them both equally: at any rate, when each makes a financial contribution which is substantial": Gissing v. Gissing [1969] 2 Ch. 85, per Lord Denning M.R. at 93, (overruled [1971] A.C. 886 (H.L.)).

[48] The Law Commission, Published Working Paper No. 42: Family Property Law 60 (October 1971).

[49] [1970] A.C. 777.

[50] [1971] A.C. 886.

end to the doctrine of "family assets".[51] The courts, it seems, were not to be concerned with dispensing "justice", but with the consideration of "the cold legal question"[52] of property rights.

Unfortunately, the combined effect of the speeches in Pettitt[53] and Gissing[54] was to leave the law relating to matrimonial property rights in a rather confused state. It is not proposed to pursue that matter here, however,[55] except insofar as it bears on our discussion of

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[51] See e.g., Pettitt v. Pettitt [1970] A.C. 777, per Lord Upjohn at 817: "My Lords, in my opinion the expression "family assets" is devoid of legal meaning and its use can define no legal rights or obligations. Of course, if it appears from the evidence that the parties in fact did agree to pool their assets into one jointly owned fund, that is a different matter, but that must be a question of fact in each case." See also, The Law Commission, Published Working Paper No. 42: Family Property Law 14: "Although reference has been made [i.e., in the Working Paper] to "family assets", the term has no precise legal meaning. It is no more than a synonym for "family property", also a term of no precise legal meaning. These terms are used to describe property acquired by the efforts of the spouses during the marriage, or property of either spouse from any source which is used chiefly for the benefit of the family as a whole; or even, sometimes, all the property of the spouses. We attempt no exact definition: we use either term as a convenient way of describing property in which, it seems reasonable to argue, both spouses should have some interest, either because of the way in which it was acquired or because of the manner in which it is used." (Footnotes omitted.) cf. Lesser, The Acquisition of Inter Vivos Matrimonial Property Rights in English Law: A Doctrinal Melting Pot (1973) 23 U. of T. L.J. 148 at 177-180, 182-184.

[52] The phrase is used by Lord Denning M.R. and Edmund Davies L.J. (dissenting) in the Court of Appeal decision in Gissing v. Gissing [1969] 2 Ch. 85 at 93 and 94, respectively.

[53] [1970] A.C. 777.

[54] [1971] A.C. 886.

[55] A detailed comparison of Pettitt and Gissing is undertaken in Lesser, The Acquisition of Inter Vivos Matrimonial Property Rights in English Law: A Doctrinal Melting Pot (1973) 23 U. of T. L.J. 148. At 196 he states that: [I]t is possible to state the general approach which the

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the constructive trust. For present purposes, then, it is sufficient to

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House of Lords requires in cases where a spouse with no legal title to matrimonial property claims an interest it: 1/ Where there is a deed of conveyance--which there is bound to be in cases involving realty--the court must examine the deed to ascertain whether it makes express provision for the allocation of beneficial interests in the property. 2/ If the conveyance is silent or if there is no conveyance --which is likely in cases involving personalty--the court must determine whether the spouses made any express agreement about their proprietary rights. If they did, either that agreement will have been contractual, and its provisions will be positively applied to decide the case, or it will have been non-contractual but will still serve either the generate a trust in the claimant's favour or to rebut any presumption of co-ownership that might otherwise arise. If it serves in the latter capacity then the dispute must be resolved solely by reference to legal title. 3/ In the absence of any express agreement the court must examine the conduct of the spouses throughout the period of acquisition--which includes any period during which outstanding instalments on the purchase price or on the loan to facilitate purchase are being paid off--to determine whether that conduct evinced an intention that the non-owner of the property should acquire an interest in it. If no such intention can be inferred the court has no power to impute any such intention and, again, legal title will be held to have arisen therefrom. 4/ Under this trust, and prima facie under any trust arising from express agreement, the spouses will be equitable tenants in common either in proportion to their contributions or in equal shares."

Further, it should be noted that in England the problems of the claiming spouse have been to some extent alleviated by the provisions of the Matrimonial Proceedings and Property Act, 1970, section 4 and section 37. Section 4 provides that on granting a decree of divorce, nullity, or judicial separation, or at any time thereafter, the court may make one or more of certain orders: (a) an order that a party to the marriage shall transfer to the other party, to any child of the family, or to such person as may be specified in the order for the benefit of such [a] child such property as may be so specified, being property to which the first mentioned party is entitled, either in possession or reversion; (b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them; (c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage; (d) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement. . . . Section 37 provides: "It is hereby declared that
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observe that in Gissing v. Gissing[56] the House of Lords, in rejecting the "family assets" approach, supplanted it with what, for want of a more convenient expression, we may call the "trust approach".[57] For Lord Pearson, this involved a return to the application of traditional resulting trust principles as laid down in Dyer v. Dyer,[58] in the absence of an express agreement between the spouses as to their property rights. However, three of the other judges[59] had rather different

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where a husband or wife contributes in money or money's worth to the improvement of real or personal property in which or in the proceeds of sale of which either or both of them has or have a beneficial interest, the husband or wife so contributing shall, if the contribution is of a substantial nature and subject to any agreement between them to the contrary, express or implied, be treated as having then acquired by virtue of his or her contribution a share or an enlarged share, as the case may be, in that beneficial interest of such an extent as may have been then agreed or, in default of such agreement, as may seem in all the circumstances just to any court before which the question of the existence or extent of the beneficial interest of the husband or wife arises. . . ."

[56][1971] A.C. 886.

[57]The expression is meant to convey only that the House of Lords in Gissing v. Gissing [1971] A.C. 886 agreed that in the absence of any express agreement between the spouses about a sharing of the beneficial interest the proper method for determining the claim was by application of the law of trusts. It is not meant to suggest that there was any general agreement among the members of the Court as to what trust principles were applicable.

[58](1788) 2 Cox Eq. Cas. 92. Thus, Lord Pearson states: "If the respondent's claim is to be valid, I think it must be on the basis that by virtue of contributions made by her towards the purchase of the house there was and is a resulting trust in her favour. . . . The starting point, in a case where substantial contributions are proved to have been made, is the presumption of a resulting trust, although it may be replaced by rebutting evidence": [1971] A.C. 886 at 902. This also was the approach favoured by Lord Upjohn in Pettitt v. Pettitt [1970] A.C. 777 at 813.

[59]Namely, Lord Reid, Viscount Dilhorne and Lord Diplock. Lord Morris really added nothing to what he had said in Pettitt v. Pettitt [1970] A.C. 777 at 797.

ideas about the nature of the trust which was involved.

In the view of Lord Reid,[60] a trust could be imposed by the court in the absence of any agreement between the spouses as to the sharing of the beneficial interest wherever the spouse in whose name the legal interest was vested accepted from the claiming spouse contributions "without which the house would not have been bought."[61] In the view of Viscount Dilhorne,[62] on the other hand, the finding of a common intention (whether by words or by conduct) at the time of the acquisition of

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[60] "If there has been no discussion and no agreement or understanding as to sharing in the ownership of the house and the husband has never evinced an intention that his wife should have a share, then the crucial question is whether the law will give a share to a wife who has made those contributions without which the house would not have been bought. I agree that this depends on the law of trust rather than on the law of contract, so the question is under what circumstances does the husband become a trustee for his wife in the absence of any declaration of trust or agreement on his part. It is not disputed that a man can become a trustee without making a declaration of trust or evincing any intention to become a trustee. The facts may impose upon him an implied, constructive or resulting trust. Why does the fact that he has agreed to accept these contributions from his wife not impose such a trust upon him?" [1971] A.C. 886 at 896.

[61] Id.

[62] "I agree with my noble and learned friend Lord Diplock that a claim to a beneficial interest in land made by a person in whom the legal estate is not vested and whether made by a stranger, a spouse or a former spouse must depend for its success on establishing that it is held on a trust to give effect to the beneficial interest of the claimant as cestui que trust. Where there was a common intention at the time of the acquisition of the house that the beneficial interest in it should be shared, it would be a breach of faith by the spouse in whose name the legal estate was vested to fail to give effect to that intention and the other spouse will be held entitled to a share in the beneficial interest. . . .

"My Lords, in determining whether or not there was such a common intention, regard can of course be had to the conduct of the parties.": Id. at 900.

the property that the beneficial interest in it should be shared, was a prerequisite to the imposition of a trust. In his words: "[i]t would be a breach of faith by the spouse in whose name the legal estate was vested to fail to give effect to that intention and the other spouse will be held entitled to a share in the beneficial interest."[63] Lord Diplock,[64] as we have seen,[65] regarded the trust as arising: "Whenever

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[63] Id.

[64] "Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based on the proposition that the person in whom the legal estate is vested holds it as trustee on trust to give effect to the beneficial interest of the claimant as cestui que trust. The legal principles applicable to the claim are those of the English law of trusts and in particular, in the kind of dispute between spouses that comes before the courts, the law relating to the creation and operation of "resulting, implied or constructive trusts". Where the trust is expressly declared in the instrument by which the legal estate is transferred to the trustee or by a written declaration of trust by the trustee, the court must give effect to it. . . . If it is not in writing it can only take effect as a resulting, implied or constructive trust. . . .

"A resulting, implied or constructive trust--and it is unnecessary for present purposes to distinguish between these three classes of trust is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.

"This is why it has been repeatedly said in the context of disputes between spouses as to their respective beneficial interests in the matrimonial home, that if at the time of its acquisition and transfer of the legal estate into the name of one or the other of them an express agreement has been made between them as to the way in which the beneficial interest shall be held, the court will give effect to it--notwithstanding the absence of any written declaration of trust. Strictly speaking this states the principle too widely, for if the agreement did not provide for anything to be done by the spouse in whom the legal estate was not to be vested, it would be a merely voluntary declaration of trust and unenforceable for want of writing. But

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the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired."[66] Such a situation would arise, he suggested, if by his words or conduct the legal owner induced the claimant to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land: for example, by suggesting that by contributing to the purchase price or to the deposit or to the mortgage instalments the spouse in whom the legal estate was not vested would acquire a beneficial interest. "What the court gives effect to," said Lord Diplock, "is the trust resulting or implied from the common intention expressed in the oral agreement between the spouses that if each acts in the manner provided for in the agreement the beneficial interests in the matrimonial home shall be held as they have agreed."[67]

None of their Lordships stayed to consider whether the trust which he was describing should be regarded as an implied, resulting or constructive trust. Their failure to do so is evidence of the notorious

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in the express oral agreements contemplated by these dicta it has been assumed sub silentio that they provide for the spouse in whom the legal estate in the matrimonial home is not vested to do something to facilitate its acquisition, by contributing to the purchase price or to the deposit or the mortgage instalments when it is purchased on mortgage or to make some other material sacrifice by way of contribution to or economy in the general family expenditure. What the court gives effect to is the trust resulting or implied from the common intention expressed in the oral agreement between the spouses that if each acts in the manner provided for in the agreement the beneficial interests in the matrimonial home shall be held as they have agreed.": Id. at 904-905.

[65] Supra, at 32.

[66] [1971] A.C. 886 at 905.

[67] Id.

difficulty,[68] if not impossibility,[69] of defining each of these types of trusts in such a way that it is exclusive of the others. A resulting trust, for example, is regarded as sometimes arising by operation of law to give effect to the presumed intentions of the parties, and sometimes arising by operation of law irrespective of the intention of the parties.[70] How is this latter type of resulting trust to be distinguished from a constructive trust, which also is said to arise by operation of law irrespective of the intentions of the parties?[71] The circumstances may also make it difficult to distinguish between a constructive trust and an implied trust. In theory, of course, these types of trusts are easily distinguishable: a constructive trust, as we have said, arises by operation of law, whereas an implied trust is classified generically with an express trust: where the parties have not expressed an intention to create a trust, it may be possible for the court to imply one from the circumstances. In practice, however, a court occasionally will give effect to a trust without specifying the type of trust which

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[68] See e.g., the discussion by Waters, The Doctrine of Resulting Trusts in Common Law Canada (1970) 16 McGill L.J. 187 at 189-191.

[69] See e.g., the suggestion by Lord Denning M.R. in Hussey v. Palmer [1972] 1 W.L.R. 1286 at 1289, that the difference between a resulting trust and a constructive trust "is more a matter of words than anything else."

[70] See e.g., Vandervell v. Inland Revenue Commissioners [1967] 2 A.C. 291, per Lord Upjohn at 312-314. See also, Lesser, The Acquisition of Inter Vivos Matrimonial Property Rights in English Law: A Doctrinal Melting Pot (1973) 23 U. of T. L.J. 148 at 176, n. 104.

[71] See e.g., Maudsley, Proprietary Remedies for the Recovery of Money (1959) 75 L.Q. Rev. 234 at 236.

was involved:[72] the reader is left to surmise whether the facts were regarded as sufficient to justify the imposition of a trust, or whether they were regarded as sufficient to create a trust. There is a further problem in distinguishing between a constructive trust and an implied trust; and it appears to relate to the traditional English view of the constructive trust as a substantive institution. In a number of the constructive trust cases, particularly those which concern the scope of fiduciary obligations,[73] and those which involve "equitable fraud",[74] the analysis of the facts which led the court to impose the trust is not made clear. Did the act of the defendant give rise to the trust, the pre-existing agreement between the parties (where there was such an agreement) being merely a factor in the surrounding circumstances which helped characterize the act as "unconscionable"; or did the agreement itself, while not expressing an intention to create a trust, give rise to fiduciary obligations, which were enforced by way of the trust? For the most part the English courts, because of traditional analogy thinking probably would prefer the latter analysis.[75] Moreover, it is clear that

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[72]See e.g., Re Gillespie [1969] 1 O.R. 585 (Ont. C.A.).

[73]See e.g., Stewart v. Molybdenum Mining & Production Co. (1921) 60 D.L.R. 497 (B.C.C.A.), Fraser v. Fraser [1933] 2 D.L.R. 513 (S.C.C.), Follis v. Township of Albemarle [1941] 1 D.L.R. 178 (Ont. C.A.), McLeod v. Sweezey [1944] 2 D.L.R. 145 (S.C.C.), Pre-Cam Exploration and Development Ltd. v. McTavish (1966) 57 D.L.R. (2d) 557 (S.C.C.).

[74]See e.g., Neale v. Willis (1968) 19 P. & C.R. 836 (C.A.), Binions v. Evans [1972] Ch. 359 (C.A.), Hussey v. Palmer [1972] 1 W.L.R. 1286 (C.A.)

[75]The importance of decisions such as Bannister v. Bannister [1948] 2 All E.R. 133, and Hussey v. Palmer [1972] 1 W.L.R. 1286, is that they recognize that: "The trust may arise at the outset when the property is acquired, or later on, as the circumstances may require," per Lord Denning M.R., id. at 1290.

they have gone beyond merely using the agreement as the basis for the imposition of the trust, and have actually enforced the terms of the agreement by means of the trust. This is most apparent in those cases where a constructive trust was invoked in order to confer a benefit upon a third party.[76] These latter decisions, it is submitted, tend to blur the distinction between a legally imposed trust and a trust implied from the circumstances, since they allow the constructive trust to "work forward", and not merely to effect restitution.[77]

Given the looseness of the terminology in the area, it is very much a matter of debate which description is most appropriate for the trusts which were discussed by the various members of the House of Lords in the Gissing[78] case. On the one hand, it has been suggested[79] that the trust described by Viscount Dilhorne[80] and Lord Diplock[81] arises out of, or implements, the expressed or implied intentions of the parties, and therefore falls clearly within the realm of resulting trusts. On the other hand, it has been suggested that: "to some extent,

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[76] See e.g., Neale v. Willis (1968) 19 P. & C.R. 836, Binions v. Evans [1972] Ch. 359.

[77] cf. the remarks of Duff J. in Scheuerman v. Scheuerman (1916) 28 D.L.R. 223 at 230 (S.C.C.).

[78] [1971] A.C. 886.

[79] Waters, Law of Trust in Canada 314, n. 82 (1974). A "resulting trust" approach was applied by Bagnall J. in Cowcher v. Cowcher [1972] 1 All E.R. 943.

[80] [1971] A.C. 886 at 901.

[81] Id. at 905.

for all three of their lordships[82] the trust arises out of equity's long established jurisdiction to impose constructive trusts in order to prevent one party enjoying the fruits of unconscionable behavior towards the other."[83] Subsequent decisions of the English Court of Appeal favour this second interpretation. In fact, while purporting to follow Gissing[84] they have considerably extended what was said in that case. The clear view which was expressed in the speeches of Viscount Dilhorne[85] and Lord Diplock[86] was that a trust would be imposed only where the facts established the existence of an express agreement, or an agreement which could be implied from the circumstances. The Court of Appeal, however, has interpreted Gissing[87] to mean that a trust may be imposed on one party in favour of the other even in the absence of an agreement, wherever necessary to do justice between the parties, having regard to all the circumstances of the case To mention just a few examples:

In Falconer v. Falconer,[88] Lord Denning M.R., referring to the

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[82]Namely, Lord Reid, Viscount Dilhorne and Lord Diplock.

[83]Lesser, The Acquisition of Inter Vivos Matrimonial Property Rights in English Law: A Doctrinal Melting Pot (1973) 23 U. of T. L.J. 148 at 189 (citing inter alia Bannister v. Bannister [1948] 2 All E.R. 133).

[84][1971] A.C. 886.

[85]Id. at 900.

[86]Id. at 904-905.

[87]Id.

[88][1970] 3 All E.R. 449 (C.A.).

decision in Gissing v. Gissing,[89] said: "[Gissing v. Gissing[90]] stated the principles on which a matrimonial home, which stands in the name of husband or wife alone, is nevertheless held to belong to them both jointly (in equal or unequal shares). It is done, not so much by virtue of an agreement, express or implied, but rather by virtue of a trust which is imposed by law. The law imputes to husband and wife an intention to create a trust, the one for the other. It does so by way of an inference from their conduct and the surrounding circumstances, even though the parties themselves made no agreement on it."[91]

In Heseltine v. Heseltine,[92] Lord Denning M.R. quoted the passage which is set out above[93] from Lord Diplock in the Gissing[94] case, and said: "What Lord Diplock said about land applies also to shares, money or chattels. If the conduct of the husband is such that it would be inequitable for him to claim the property beneficially as his own, then, although it is transferred into his name, the court will

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[89][1971] A.C. 886.

[90]Id.

[91][1970] 3 All E.R. 449 at 452. Note the comment of Lesser, The Acquisition of Inter Vivos Matrimonial Property Rights in English Law: A Doctrinal Melting Pot (1973) 23 U. of T. L.J. 148 at 198: "If this view of the effect of Gissing, concurred in by Megaw L.J. and Sir Frederick Sellers, is correct then it follows that the doctrine of family assets previously enunciated by Lord Denning stands unaffected and that Gissing has worked no practical change in the criteria for resolving matrimonial property disputes, a remarkable conclusion in the light of what was actually said in Gissing."

[92][1971] 1 All E.R. 952 (C.A.).

[93]Supra, text at n. 42.

[94][1971] A.C. 886.

impose on him a trust to hold it for them both jointly, or for her alone, as the circumstances of the case may require.[95]

In Davis v. Vale,[96] in computing the various sums which the husband and wife had contributed towards the matrimonial home, Lord Denning M.R. said: "All these matters can be added up in considering the question: what is the proper trust for the courts to impose or infer? What is the extent of the beneficial interests of each? What is 'just in all the circumstances of the case?'"[97]

In Hussey v. Palmer,[98] Lord Denning M.R. said: "[W]e have repeatedly held that, when the person contributes towards the purchase price of a house, the owner holds it on a constructive trust for him, proportionate to his contribution, even though there is no agreement between them, and no declaration of trust to be found, and no evidence of any intention to create a trust."[99] Citing inter alia Falconer v. Falconer[100] and Heseltine v. Heseltine,[101] he concluded: "In all those cases it would have been quite inequitable for the legal owner to take the property for himself and exclude the other from it. So the law

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[95][1971] 1 All E.R. 952 at 955.

[96][1971] 2 All E.R. 1021 (C.A.).

[97]Id. at 1026.

[98][1972] 1 W.L.R. 1286 (C.A.). See also, supra, text at n. 31.

[99]Id. at 1290

[100][1970] 3 All E.R. 449.

[101][1971] 1 All E.R. 952.

imputed or imposed a trust for his or her benefit."[102]

The import of these comments, it is submitted, is that, for Lord Denning M.R. at least, "unconscionability" is not merely the basis for imposing a trust once the respective rights of the parties have been established on the basis of an agreement expressed or implied from the surrounding circumstances; it may be employed as a criterion for determining what the rights of the parties actually are.[103] If this use of the constructive trust is not what was envisaged by the House of Lords in Gissing v. Gissing,[104] nevertheless the development is an understandable one. To begin with, the dividing line between inference and imputation must, as a practical matter, be very difficult to draw. Secondly, in the light of the cases which were discussed in the first

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[102] [1972] 1 W.L.R. 1286 at 1290.

[103] In this context, note the comments of Laskin J. (dissenting) in Murdoch v. Murdoch (1974) 41 D.L.R. (3d) 367 (S.C.C.) at 389: "Although later English cases have continued to speak in terms of the resulting trust both where the financial contribution has been direct (see Heseltine v. Heseltine, [1971] 1 All E.R. 952) and where it has been indirect (see Falconer v. Falconer, [1970] 3 All E.R. 449), some of them are more easily explicable on the basis of a constructive trust: see Hargrave v. Newton, [1971] 3 All E.R. 866; cf. Hussey v. Palmer, [1972] 3 All E.R. 744. What has emerged in the recent cases as the law is that if contributions are established, they supply the basis for a beneficial interest without the necessity of proving in addition an agreement (see Hazell v. Hazell, [1972] 1 All E.R. 923), and that the contributions may be indirect or take the form of physical labour (see Re Cummins, [1971] 3 All E.R. 782)."

[104] cf. the words of Lord Diplock in Gissing v. Gissing [1971] A.C. 886 at 909: "Difficult as they are to solve, however, these problems as to the amount of the share of a spouse in a beneficial interest in a matrimonial home where the legal estate is vested solely in the other spouse, only arise in cases where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other."

section of this Chapter,[105] a restrictive interpretation of the speeches in the Gissing[106] case would seem to produce the curious result that, within the context of matrimonial property disputes the imposition of a constructive trust will be limited to the carrying out of an express or implied agreement, whereas in other areas the constructive trust will have a much wider sphere of operation.

II. CANADIAN DEVELOPMENTS

A. The Remedial Nature of Canadian Trust Law

Writing in the Trusts Section of the Annual Survey of Commonwealth Law for 1969, Mr. J. D. Davies makes passing reference to "the remedial nature of trust law in Canada."[107] The suggestion which he appears to be making is that it is not unusual for a Canadian court either to find that the facts before it give rise to a trust (express or implied), or that they warrant the imposition of a trust (resulting or constructive), where such a finding will assist the court in arriving at what it conceives to be the equitable result. While the practice is certainly not generally acknowledged by the courts,[108] it

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[105] Supra, at 88 et seq.

[106] [1971] A.C. 886.

[107] Davies, Trusts (1969) Annual Survey of Commonwealth Law 365 at 380, 388. The cases cited by Mr. Davies are: Whonnock Lumber Co. Ltd. v. G. and F. Logging Co. (1968) 69 D.L.R. (2d) 561 (B.C.C.A.), Roman v. Crichton (1969) 3 D.L.R. (3d) 673 (S.C.C.), Re Bank of Western Canada (1968) 70 D.L.R. (2d) 113, rev'd. (1970) 8 D.L.R. (3d) 593 (Ont. C.A.).

[108] cf. the comment of Laskin J.A. in Crichton v. Roman (1968) 67 D.L.R. (2d) 669 at 674: "In the present case, the declaration of trusteeship

[Continued on next page.]

is not too difficult to find in the case law decisions which support this suggestion.[109]

A case in point is the Supreme Court of Nova Scotia decision in Langille v. Nass.[110] There, the grantors agreed to donate to the residents of their local community certain property on which might be built a hall for use by the residents for social and religious purposes. The residents were to pay for the cost of the building. Pursuant to this arrangement, the land was conveyed by the grantors to three residents of the community, as trustees; but the trusts were never reduced to writing. Money was raised by general collections and the hall was duly built. Subsequently, however, a dispute arose within the community concerning the uses to which the building might be put. The trustees associated themselves with one of the factions to the dispute, and attempted to prevent the other faction from using the building. Furthermore, they drew up (but did not deliver), a deed which purported to transfer the trust property to trustees for the benefit of their particular faction only. A declaration was sought by members of the opposing faction that they were entitled to use the hall for religious and social

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[Continued from page 114.]
was the remedial method of resolving the original contest as to the beneficial ownership of company shares which were nominally held in the name of a third person in trust for [the defendant]."

[109] The discussion in the text shall be confined to the remedial constructive trust cases. For cases where an express or implied trust appears to have been "found" as a means of achieving the desired result, see e.g.: Bobbie v. Gilchrist (1953) 9 W.W.R. 458 (Man. Q.B.), Smarzik v. Bogdalik (1959) 29 W.W.R. 481 (Man. Q.B.), Croft v. Humphrey (1971) 18 D.L.R. (3d) 20 (N.S.S.C.), Shabinsky v. Horwitz [1973] 1 O.R. 745 (Ont. H.C.).

[110] (1917) 36 D.L.R. 368.

purposes, and for an order setting aside the proposed conveyance. It therefore fell to the court to determine for what purposes the property might be used, and to whom the trustees were responsible. Although the court made no mention of the matter, it is clear that, had it found that the trust failed for want of written evidence of its terms, there would have been a resulting trust back to the heirs of the grantors. This inconvenient result was avoided, however, by invoking the maxim that "Equity will not permit the Statute of Frauds to be used as an instrument of fraud," and imposing a constructive trust to "restrain [the trustees] . . . from claiming to hold [the property] on trusts other than those justified by the intentions of the founders."[111]

The imposition of a constructive trust to enforce the terms of an express oral trust which, by virtue of section 7 of the Statute of Frauds,[112] is unenforceable, is a legal technique which has given rise to considerable controversy. In the Supreme Court of Canada decision in Scheuerman v. Scheuerman,[113] which shortly preceded the Langille[114] case, Duff J., inferentially at least, disapproved of the use of a constructive trust for such purpose. The beneficiary of an express oral trust of land was not in a position to enforce the trust, and neither,

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[111] Id. at 374, per Graham C.J.

[112] 29 Car. II, c. 3. Section 7 states: "And be it further enacted that all declarations or creations of trusts or confidences of any land, tenements or hereditaments, shall be manifested and proved by some writing, signed by the party who is, by law, enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

[113] (1916) 28 D.L.R. 223 (S.C.C.).

[114] (1917) 36 D.L.R. 368.

he implied, could the court by way of a constructive trust enforce it for him, for that would be to fly in the face of the Statute. The appropriate action in such circumstances, he suggested, was an action by the transferor against the transferee for restitutio in integrum, on the ground that the latter's fraudulent refusal to give effect to the terms of the express trust under which the property was acquired constituted him a trustee for the transferor.[115] The view of Duff J. has been endorsed by the editors of the Dominion Law Reports,[116] and again, most recently, by Professor D. W. M. Waters.[117] The courts so often have turned a blind eye to the requirements of section 7, these authorities suggest, that one wonders why the provision is not simply repealed. However, until such time as it is repealed, or Langille v. Nass[118] is overruled, that case provides authority to support the proposition that a constructive trust can be imposed in order to enforce the terms of an "unenforceable" oral trust of land. The case is a clear example of a Canadian court imposing a constructive trust in order to achieve the desired equitable result.

A further decision which should be mentioned in this context is that of the Privy Council, on appeal from the Nova Scotia Court of

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[115](1916) 28 D.L.R. 223 at 230.

[116]See the Editorial Note to Brown v. Storoschuk [1947] 1 D.L.R. 227 (B.C.C.A.) at 228.

[117]Water, Law of Trusts in Canada 198-201 (1974).

[118](1917) 36 D.L.R. 368.

Appeal, in Lord Strathcona SS. Co. Ltd. v. Dominion Coal Co. Ltd.[119] The facts (somewhat simplified) were as follows. The Dominion Coal Company had chartered the "Lord Strathcona" from her owners in 1914. The ship was subsequently requisitioned, and, while so requisitioned, was sold. It was ultimately purchased by the Lord Strathcona Company which, at the time of purchase, expressly agreed with the transferors to carry out the terms of the charter-party. In 1919 when the "Lord Strathcona" was de-requisitioned, Dominion Coal claimed their rights as charterers. The Lord Strathcona Company claimed, however, that since there was no privity of contract between themselves and Dominion Coal, they were not obliged, either at law or in equity, to carry out the terms of the charter-party. Lord Shaw, who delivered the judgment of the Board, disagreed. The gist of his judgment was that the original charter-party gave rise to rights over the ship which, in a manner analogous to equitable easements, restricted the uses to which the ship might be put by the owner, and bound third parties taking title to the ship with notice of those rights. He stated in part:[120]

> If a man acquires from another rights in a ship which is already under charter, with notice of rights which required the ship to be used for a particular purpose and not inconsistently with it, then he appears to be plainly in the position of a constructive trustee with obligations which a Court of Equity will not permit him to violate. It does not matter that this Court cannot enforce specific performance. It can proceed, if there is express or clearly implied a negative stipulation.

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[119] [1926] 1 D.L.R. 873 (P.C.). For valuable comments on the case, see Waters, Law of Trusts in Canada 57-60, 347 (1974).

[120] [1926] 1 D.L.R. 883-884.

In the result, an injunction was granted to restrain the Lord Strathcona Company from violating the conditions of purchase to the prejudice of Dominion Coal.

The decision in the Lord Strathcona[121] case was criticized and not followed by Diplock J. in Port Line Ltd. v. Ben Line Steamers Ltd.[122] To begin with, he suggested that the analogy with equitable easements could not be sustained. In order for a restrictive covenant relating to land to be binding, the convenience must retain a proprietary interest in the land which is benefited by the covenant. But a time charter is a contract for services, and does not give the charterer a proprietary or possessory interest in the ship to which the covenant relates.[123] Secondly, he questioned the nature of the constructive trust which was said to arise in the Lord Strathcona case. Was it a constructive trust sui generis, which permitted only the bringing of injunction proceedings, and no other remedy? Did not a constructive trust import other remedies, "such as the right to an account, the making of a vesting order or the appointment of a new trustee"?[124] This criticism has been met in the following terms by Professor Waters:[125]

> [T]he constructive trust, unlike the implied trust, arises only by operation of law; it

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[121] Id.

[122] [1958] 2 Q.B. 146.

[123] Id. at 166.

[124] Id. at 167.

[125] Waters, Law of Trusts in Canada 59 (1974).

> arises to the extent that it is required to do so in order to remedy the situation in hand. In Strathcona it described the obligation of the purchaser under threat of injunction to recognize the charter-party of which he had had full notice at the time of purchase. It may be that an injunction should not be available to the charterer against the third party if specific performance of the contract is not also available to him, but once the court was prepared to apply any remedy against the new owner of the chattel requiring him to recognize a right of another in that chattel, at that moment the owner became a constructive trustee.

So viewed, the Lord Strathcona[126] case provides a further illustration of the constructive trust being used as a device which will enable the court to achieve the desired equitable result.

B. The Unjust Enrichment Cases

In Chapter One,[127] reference was made to a number of Canadian decisions,[128] including the recent Supreme Court decision in Murdoch v. Murdoch,[129] in which it was suggested that the constructive trust was an equitable remedy which was imposed by the court in order to prevent unjust enrichment. In the light of our discussion of the Gissing[130]

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[126] [1926] 1 D.L.R. 873.

[127] Supra, at 28 et seq.

[128] See e.g., Pahara v. Pahara [1946] 1 D.L.R. 433 (S.C.C.), per Rand J. at 437, Schobelt v. Barber [1967] 1 O.R. 349 (Ont. H.C.), per Moorhouse J. at 354, Jirna Ltd. v. Mister Donut of Canada Ltd. [1970] 3 O.R. 629 (Ont. H.C.), per Stark J. at 641 (overruled on the ground that no fiduciary relationship existed: (1972) 22 D.L.R. (3d) 639, aff'd. (1973) 40 D.L.R. (3d) 303 (S.C.C.)).

[129] (1974) 41 D.L.R. (3d) 367.

[130] [1971] A.C. 886. See supra, at 97 et seq.

case it is convenient now to take a closer look at what actually was decided in the Murdoch[131] case, and to consider what will be the likely effect of that decision on the development of the constructive trust concept in Canada.

The issue there, it will be recalled, was whether the wife was entitled, by virtue of the contributions which she had made, to a beneficial interest in certain property standing in the name of the husband. The wife based her claim on a resulting trust, and it was accepted by a majority of the Supreme Court that the law of resulting trusts provided the theoretical basis for the determination of claims of this nature. However, the wife's claim was rejected. Martland J., who delivered the majority judgment, accepted the finding of fact which had been made at first instance that she had made no direct contribution to the purchase price of the property, and that her indirect contributions in the form of labour were insufficient to support her claim to a beneficial interest in the property, since she had done no more than would be ordinarily expected of any rancher's wife. This finding of itself was sufficient to defeat the claim. However, Martland J. took the opportunity to embark upon a discussion of relevant trust principles.

Basing himself on the speech of Lord Diplock in Gissing v. Gissing,[132] he held that a resulting trust of land would arise in favour of the spouse who had no legal title where, on the legal title being acquired by the other spouse, an express trust was declared which conferred a share upon the claiming spouse; or alternatively, where the

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[131](1974) 41 D.L.R. (3d) 367.

[132][1971] A.C. 886 at 904-905.

holder of the legal title by his words or conduct at the time of acquisition of the property induced the other to act to his or her detriment in the reasonable belief that by so acting he or she would acquire a beneficial interest in the land. The view was quite clearly expressed, however, that this trust was merely the means for giving effect to the common intentions of the parties, once these had been established on the basis of an agreement which was expressed or could be implied from the circumstances. By necessary implication, therefore, Martland J. would not approve of those post-Gissing[133] decisions in the English Court of Appeal[134] which suggest that broad principles of fairness, or what is "just in all the circumstances of the case" may be employed to determine the rights of the parties inter se.

On the other hand, Laskin J., who dissented, held that Mrs. Murdoch had made a substantial contribution to the property in the form of her physical labour, and that she was entitled to have this contribution recognized by the imposition of a constructive trust in her favour:[135]

> The appropriate mechanism to give relief to a wife who cannot prove a common intention or to a wife whose contribution to the acquisition of property is physical labour rather than purchase money is the constructive trust which does not depend on evidence of intention. Perhaps the resulting trust should be as readily available in the case of a contribution of

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[133][1971] A.C. 886.

[134]See supra, at 109 et seq.

[135](1974) 41 D.L.R. (3d) 367 at 388.

> physical labour as in the case of a financial contribution, but the historical roots of the inference that is raised in the latter case do not exist in the former. It is unnecessary to bend or adapt them to the desired end because the constructive trust more easily serves the purpose. As is pointed out by Scott:[136]
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> > . . . a constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. . . . The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it. Ordinarily, a constructive trust arises without regard to the intention of the person who transferred the property. . . .

It is evident, therefore, from a comparison of the approaches of Martland J. and Laskin J., that dissension exists at the highest judicial level concerning the proper legal basis for dealing with these matrimonial property cases; and, in the absence of much needed legislation, it is not clear how they will be disposed of in the future. It is at least arguable, however, that should the Supreme Court so desire, the way is open for the constructive trust approach to prevail. As Professor Waters has recently pointed out,[137] since the wife in the Murdoch[138] case was found by the majority to have made no contribution, it can be contended that what Martland J. had to say on the law is obiter dicta. If this course is followed, the court will then be free to apply

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[136] Scott, V Trusts 3215 (3rd ed. 1967).

[137] Waters, Law of Trusts in Canada 717 (1974).

[138] (1974) 41 D.L.R. (3d) 367.

the law as expounded in Laskin J.'s dissent.

More important even than the specific question whether the constructive trust approach as described by Laskin J. will be adopted as the method for resolving matrimonial property disputes, is the general question whether the judgment of Laskin J. will be taken by other Canadian courts as an encouragement to adopt and apply the concept of a remedial constructive trust. If so, then how will this be done? Is the judgment to be taken as simply extending the scope of the constructive trust as we now know it, by making acceptable the notion of unjust enrichment as one basis for the imposition of a constructive trust? Or does it demand the complete revision of the law in this area, including the rejection of any notion of an institutional constructive trust, and the rationalization of the body of existing case law into the American conception of the remedial constructive trust? To this matter we shall now turn our attention.

CHAPTER FOUR

SUMMARY AND CONCLUSIONS

In summary, it is submitted that the following general points emerge from the preceding discussion:

(1) The major influence upon the development of the Canadian constructive trust has been the English law. In order to understand the constructive trust at its present stage of development, therefore, it is necessary to understand something of the English concept.

(2) At the heart of the difficulties associated with the English constructive trust is the fact that, for historical reasons, it has been conceptualized by the courts, and many writers, in a way which obscures its essential function. Properly understood, the function of the constructive trust is remedial. It fastens upon specific property in the hands of one person, and requires that property to be dealt with in a certain way for the benefit of another, in order to right a wrong which has been done.

(3) The remedial function of the constructive trust, as has been said, was for long obscured by its historical origins. The constructive trust grew up as a "country cousin" of the express trust, and the practice of the courts was to look upon it as an analogous substantive institution.

(4) This practice ignored the fundamental difference between the express trust and the constructive trust, and forced the constructive trust into a mould which it did not fit. The express trust arises from the intentions of the parties; and it is this factor which is at the root of the trust institution. The constructive trust on the other hand, is imposed by

operation of law without regard to the intention of the parties. Moreover, it is imposed in such a diversity of situations that no one theory is really adequate to explain the basis upon which the court has acted.[1] The analogy which exists between the express trust and the constructive trust is, therefore, only superficial. It may be conceded that in all those cases where a constructive trust has been imposed the court has said, in effect, that having regard to all the circumstances of the case the possessor of the property can not retain the benefit of the property for himself, and must deal with it in a certain way for the benefit of another. However, the mere fact that the obligations which the court has imposed upon the constructive trustee may in some way be likened to the obligations of an express trustee is not a sufficient basis for classifying the constructive trust, along with the express trust, as a substantive legal institution.

(5) Be that as it may, English law has never abandoned its conception of the institutional constructive trust. Over the years it has, however, come to acknowledge the existence of a remedial aspect to the trust. The most explicit judicial explanation of this view appears in the judgment of Ungoed-Thomas J. in Selangor United Rubber Estates Ltd. v. Cradock (No. 3).[2] This is the way in which most lawyers in England and in Canada would view the constructive trust today. The position has been neatly summarized by Professor Waters:[3]

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[1]See e.g., Waters, Law of Trusts in Canada 335 (1974).

[2][1968] 2 All E.R. 1073 at 1095 et seq, supra, at 58.

[3]Waters, Law of Trusts in Canada 335-336 (1974).

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> In England and the Canadian common law jursidictions constructive trusts may be broadly divided into two kinds; those which render property not otherwise subject to an express trust to be so subject, or persons not otherwise trustees to act and be responsible as though they were trustees, and, secondly, those which render the holding of property subject to terms as if the property were trust property, or require the restoration or conveyance of property to others. The first group is concerned with the operation of express trusts, the second enforces a type of obligation which is only associated by analogy with express trusteeship. The first group is made up of constructive trusts which are called substantive or institutional because the courts have traditionally regarded them as being a fourth type of trust to be compared and listed with express trusts, implied trusts, and resulting trusts. The second group, though also conceived by our courts as substantive or institutional, can in a sense, if not exactly, be described as remedial. In the absence of any express trust, they use the machinery of the trust to compel persons to honour obligations attaching to property.[4]

(6) In accordance with the guidelines laid down by Ungoed-Thomas J. in the Selangor Estates[5] case, it is submitted that the following situations provide examples of "institutional" constructive trust situations:

(1) where an express trustee[6] or other person in a pre-existing fiduciary

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[4]It must be said that to one who adheres strongly to the view that the function of the constructive trust is always remedial, the classification of the situations in which a constructive trust may be imposed as examples of either its "institutional" or its "remedial" aspect seems clumsy and artificial. It is because of the artificiality of the whole process that there has been so much room for disagreement concerning when the constructive trust is operating in its institutional or its remedial capacity: see supra, at 7.

[5][1968] 2 All E.R. 1073 at 1095 et seq.

[6]Supra, at 41.

relationship[7] secures an unauthorized profit from his trust, (2) where a trustee de son tort[8] or a stranger to a pre-existing fiduciary relationship[9] knowingly deals with trust property in a manner which is incompatable with the terms of the trust. The following situations provide examples of "remedial" constructive trust situations: (1) where a stranger to a trust (often an agent of an express trustee), without actually receiving or being in control of the trust property, knowingly assists in a fraudulent design on the part of the trustee,[10] (2) where the unconscionable act of the defendant is itself held to bring into existence a fiduciary relationship, for the breach of which he is held answerable.[11]

(7) Recent developments in the law in England suggest that the remedial role of the constructive trust is there undergoing a tremendous expansion. These developments have been brought about almost single-handedly by Lord Denning M.R. Essentially, his approach has been to push to the limits the equitable notion of unconscionability, while all but ignoring the requirement of a fiduciary relationship.[12] Using as a springboard the decision in Bannister v. Bannister,[13] Lord Denning M.R. has managed

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[7] Supra, at 60.

[8] Supra, at 48.

[9] Supra, at 53, 57, 74.

[10] Supra, at 55.

[11] Supra, at 15, 84 et seq.

[12] cf. supra, at 15.

[13] [1948] 2 All E.R. 133.

to invoke a constructive trust to achieve the following ends: to effect specific performance of a contract at the suit of the third party beneficiary;[14] to protect a contractual licensee against a purchaser with notice;[15] and to perpetuate the doctrine of "family assets"[16] in the face of two recent House of Lords decisions[17] to the contrary. Finally, with a string of his own previous decisions to support him, Lord Denning has suggested that the constructive trust should be viewed as "an equitable remedy by which the court can enable an aggrieved party to obtain restitution,"[18] and in accordance with American practice has imposed a proportionate share constructive trust.[19]

(8) The developments in Canadian law, while perhaps less dramatic, would appear to rest on a firmer foundation. We may set to one side those decisions which seem to illustrate merely a propensity for post facto judicial rationalization.[20] Quite independently of those cases, there is a clear, if slender, line of authority which acknowledges the existence of the unjust enrichment principle in Canadian trust law.[21]

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[14] Neale v. Willis (1968) 19 P. & C.R. 836.

[15] Binions v. Evans [1972] Ch. 359.

[16] See e.g., Falconer v. Falconer [1970] 3 All E.R. 449.

[17] Pettitt v. Pettitt [1970] A.C. 777, Gissing v. Gissing [1971] A.C. 886.

[18] Hussey v. Palmer [1972] 1 W.L.R. 1286 at 1290.

[19] Id.

[20] Supra, at 113.

[21] Supra, at 28.

It is true that these decisions have not yet had a significant influence on our attitude towards the constructive trust, but perhaps the decision of Laskin J. (dissenting) in the Murdoch[22] case will provide the necessary catalyst, especially in view of his recent elevation to the position of Chief Justice of Canada.

In conclusion, it is submitted that the incorporation of the unjust enrichment principle into our trust law would prove to be an extremely beneficial development:

(i) The remedial nature of the constructive trust--its historical origins notwithstanding--would become immediately apparent. Assuming that the doctrine of unjust enrichment followed a similar line of development to that in the United States,[23] the difficulties which presently exist under our "institutional"--"remedial" classification would disappear.[24]

(ii) The fiduciary relationship would appear in its proper perspective, as merely one basis for the imposition of a constructive trust, and not as the starting point in every case for determining whether a constructive trust should be imposed.

(iii) The policy choices which are presently obscured behind a finding of, or a refusal to find, a fiduciary relationship, or behind the language of unconscionability, would be clearly presented; and, as a result, more clearly examined.

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[22](1974) 41 D.L.R. (3d) 367.

[23]See Scott, V Trusts, Para. 462.2.

[24]Supra, at 7.

(iv) We could begin to develop a systematic approach to the restitutionary remedies, including an exploration of the interrelationship of the constructive trust and the common law restitution remedy; and a re-examination and rationalization of the legal and equitable rules for following property.

BIBLIOGRAPHY

Allan, An Equity to Perfect a Gift (1963) 79 L.Q. Rev. 238.

American Law Institute, Restatement of the Law of Restitution (1937).

Beck, The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered (1971) 49 Can. Bar Rev. 80.

Bogert, Trusts and Trustees (2nd ed. 1961).

Bromley, Family Law (4th ed. 1971).

Burgess, The Juridicial Nature of Secret Trusts (1972) 23 N.I.L.Q. 263.

Carlston, Restitution--The Search for a Philosophy (1953_54) 6 J. Legal Educ. 330.

Crane, Estoppel Interests in Land (1967) 31 Conv. (N.S.) 332.

Crame, Note (1968) 32 Conv. (N.S.) 220.

Crawford, Cases and Notes on Restitution (1971).

Davies, Trusts (1968) Annual Survey of Commonwealth Law 411.

Davies, Trusts (1969) Annual Survey of Commonwealth Law 365.

Dawson, Unjust Enrichment (1951).

Dawson and Palmer, Cases on Restitution (2nd ed. 1969).

Fleming, Secret Trusts (1947) 12 Conv. (N.S.) 28.

Fridman, Agency and Secret Profits (1968) 3 Man. L. Rev. 17.

Fridman, Quasi-Contractual Aspects of Unjust Enrichment (1956) 34 Can. Bar Rev. 393.

Goff and Jones, The Law of Restitution (1966).

Gordom, Notice or Knowledge of a Trust--A Critique of the Carl Zeiss Case (1970) 44 Aust. L.J. 261.

Halsbury Laws of England (3rd ed. Hailsham 1962).

Hanbury, Modern Equity (9th ed. Maudsley 1969).

Hart, The Development of the Rule in Keech v. Sandford (1905) 21 L.Q. Rev. 258.

Hill on Trustees (3rd ed. 1853).

Jackson, Trustees Purchasing Reversions (1968) 31 Mod. L. Rev. 707.

Jacobson, Murdoch v. Murdoch: Just about What the Ordinary Rancher's Wife Does (1974) 20 McGill L.J. 308.

Jennings and Shapiro, The Minnesota Law of Constructive Trusts and Analogous Equitable Remedies (1941) 25 Minnesota L. Rev. 666.

Jones, Unjust Enrichment and the Fiduciary's Duty of Loyalty (1968) 84 L.Q. Rev. 472.

Keeton, The Law of Trusts (9th ed. 1967).

Lacey, Constructive Trusts and Equitable Liens in Iowa (1954-55) 40 Iowa L. Rev. 107.

Laskin, The British Tradition in Canadian Law (1969).

Lesser, The Acquisition of Inter Vivos Matrimonial Property Rights in English Law: A Doctrinal Melting Pot (1973) 23 U. of T. L.J. 148.

Lewin, The Law of Trusts (16th ed. Mowbray 1964).

Maudsley, Propietary Remedies for the Recovery of Money (1959) 75 L.Q. Rev. 234.

Maudsley, Restitution in England (1966) 19 Vanderbilt L. Rev. 1123.

McCamus, Book Review (1973) 23 U. of T. L.J. 472.

McCann, The Setting Aside of Deeds and Gifts Inter Vivos Obtained by the Exercise of Undue Influence (1967) 2 Ir. Jur. (N.S.) 205.

McClean, Cases and Materials on the Law of Trusts (3rd ed. 1970).

McClean, The Theoretical Basis of the Trustee's Duty of Loyalty (1969) 7 Alta. L. Rev. 218.

McClean, Unjust Enrichment--Common Law Wine in Civil Law Bottles (1969) 4 U.B.C. L. Rev. 1.

Mowat, Observations in the Use and Value of American Reports in Reference to Canadian Jurisprudence (1857) 3 U.C.L.J. (O.S.) 3.

Nathan and Marshall, A Casebook on Trusts (5th ed. 1967).

Newman, Trusts (2nd ed. 1955).

Note, (1973) 89 L.Q. Rev. 2.

Note, Must the Remedy at Law be Inadequate Before a Constructive Trust will be Impressed? (1951) 25 St. Johns L. Rev. 283.

Oakley, Has the Constructive Trust Become a General Equitable Remedy? (1973) 26 Current Legal Problems 17.

Parker and Mellows, The Modern Law of Trusts (2nd ed. 1970).

Pettit, Conversion under a Contract for the Sale of Land (1960) 24 Conv. (N.S.) 47.

Pettit, Equity and the Law of Trusts (2nd ed. 1970).

Pound, The Progress of the Law, Equity (1920) 33 Harv. L. Rev. 420.

Prentice, The Corporate Opportunity Doctrine (1974) 37 Mod. L. Rev. 464.

Scott, A. W., Constructive Trusts (1955) 71 L.Q. Rev. 39.

Scott, A. W., The Fiduciary Principle (1949) 37 Calif. L. Rev. 539.

Scott, A. W., Trusts (3rd ed. 1967).

Scott, G. K., Restitution from an Innocent Transferee who is not a Purchaser for Value (1949) Harv. L. Rev. 1002.

Sealy, Fiduciary Relationships [1962] Camb. L. J. 69.

Sealy, Some Principles of Fiduciary Obligation [1963] Camb. L.J. 119.

Sheridan, Fraud in Equity (1957).

Smith, Licences and Constructive Trusts--"The Law is What it Ought to be." (1973) 32 Camb. L.J. 123.

Snell, Principles of Equity (27th ed. Megarry and Baker 1973).

Stapleton, The Presumption of Undue Influence (1967) 17 U.N.B. L.J. 46.

Story's Equity Jurisprudence (1872).

Strathy, The Constructive Trust as a Restitutionary Remedy: The Case of Hussey v. Palmer (1974) 32 U. of T. Faculty of Law Review 83.

Sugarman, Seeing Through the Double Dutch of Corporate Opportunity (1974) 52 Can. Bar Rev. 280.

Taylor's Commentaries on Equity Jurisprudence (1876).

The Law Commission, Published Working Paper No. 42: Family Property Law (Oct. 1971).

Underhill, Law of Trusts and Trustees (11th ed. 1959).

Wade, Licences and Third Parties (1952) 68 L.Q. Rev. 337.

Waters, The Constructive Trust (1964).

Waters, The Doctrine of Resulting Trusts in Common Law Canada (1970) 16 McGill L.J. 187.

Waters, The English Constructive Trust: A Look into the Future (1966) 19 Vanderbilt L. Rev. 1215.

Waters, The Law of Trusts in Canada (1974).

Wright and Tudor, II Leading Cases in Equity (8th ed. Whittaker 1912).

Wright (Lord), Legal Essays and Addresses (1939).

Yale, II Nottingham's Chancery Cases (Selden Soc.).

Youdan, Acquisition of Property by Killing (1973) 89 L.Q. Rev. 235.

APPENDIX 1

TABLE OF CASES

A. CANADIAN

Ankcorn v. Stewart (1920) 54 D.L.R. 74 (Ont. A.D.).

Bank of Nova Scotia v. Kelly [1974] 41 D.L.R. (3d) 273 (P.E.I.).

Bobbie v. Gilchrist (1953) 9 W.W.R. 458 (Man. Q.B.).

Brown v. Storoschuk [1947] 1 D.L.R. 227 (B.C.C.A.).

Buchanan and James v. Oliver Plumbing and Heating Ltd. (1959) 18 D.L.R. (2d) 575 (Ont. C.A.).

Canada Safeway Ltd. v. Thompson (1951) 3 D.L.R. 295 (B.C.S.C.).

Canadian Aero Service Ltd. v. O'Malley (1973) 40 D.L.R. (3d) 371 (S.C.C.).

Canadian Western Natural Gas Co. Ltd. v. Central Gas Utilities Ltd. (1967) 58 W.W.R. 155 (S.C.C.).

City of Edmonton v. Hawrelak (1973) 31 D.L.R. (3d) 498 (Alta. A.D.).

Constantine v. Ioan and Chase (1969) 67 W.W.R. 615 (B.C.S.C.).

County of Carleton v. City of Ottawa (1966) 52 D.L.R. (2d) 220 (S.C.C.).

Crocker and Croquip Ltd. v. Tornroos (1957) 7 D.L.R. (2d) 104 (S.C.C.).

Croft v. Humphrey (1971) 18 D.L.R. (3d) 20 (N.S.S.C.).

Deglman v. Guaranty Trust Company of Canada [1954] S.C.R. 725.

Fern Brand Waxes Ltd. v. Pearl [1972] 3 O.R. 829 (Ont. A.D.).

Ferrier v. Reid and Knight (1966) 55 W.W.R. 299 (B.C.S.C.).

Follis v. Township of Albemarle [1941] 1 D.L.R. 178 (Ont. C.S.).

Fraser v. Fraser [1933] 2 D.L.R. 513 (S.C.C.).

Gordon v. Ottawa [1953] 4 D.L.R. 542 (Ont. H.C.).

Hayman v. Nicoll [1944] 3 D.L.R. 511 (S.C.C.).

Hicks v. Hicks [1953] 4 D.L.R. 773, aff'd. id. at 777 (B.C.C.A.).

Jirna Ltd. v. Mister Donut of Canada Ltd. [1970] 3 O.R. 629, rev'd. (1972) 22 D.L.R. (3d) 639, aff'd. (1973) 40 D.L.R. (3d) 303 (S.C.C.).

Langille v. Nass (1917) 36 D.L.R. 368 (N.S.S.C.).

Lord Strathcona S.S. Co. v. Dominion Coal Co. Ltd. [1926] 1 D.L.R. 873 (P.C.).

Maguire v. Maguire and Toronto General Trusts Corporation (1921) 64 D.L.R. 204 (Ont. S.C.).

McLellan v. Milne [1937] 3 D.L.R. 659 (Ont. S.C.).

McLeod v. Sweezey [1944] 2 D.L.R. 145 (S.C.C.).

Midcon Oil and Gas Ltd. v. New British Dominion Oil Co. (1958) 12 D.L.R. (2d) 705 (S.C.C.).

Morrison v. Coast Finance Ltd. (1965) 55 D.L.R. (2d) 710 (B.C.C.A.).

Murdoch v. Murdoch (1974) 41 D.L.R. (3d) 367 (S.C.C.).

National Trust Co. v. Osadchuk [1943] S.C.R. 89.

Pahara v. Pahara [1946] 1 D.L.R. 433 (S.C.C.).

Peso Silver Mines Ltd. v. Cropper (1966) 58 D.L.R. (2d) 1 (S.C.C.).

Pine Pass Oil and Gas Ltd. v. Pacific Petroleums Ltd. (1968) 70 D.L.R. (2d) 196 (B.C.S.C.).

Pong v. Quong [1927] 3 D.L.R. 128 (S.C.C.).

Sam Exploration and Development Ltd. v. McTavish (1966) 57 D.L.R. 557 (S.C.C.).

Trustee v. Skoretz [1973] 2 W.W.R. 638 (B.C.S.C.).

nk of Western Canada);068) 70 D.L.R. (2d) 133, rev'd. (1970) L.R. (3d) 593 (Ont. C.A.).

Gillespie [1969] 1 O.R. 585 (Ont. C.A.).

Re Pick Estate (1965) 52 W.W.R. 136 (Sask. Surr. Ct.).

Re Settled Estates Act: Re McCrossan Trust (1961-62) 36 W.W.R. 209 (B.C.S.C.).

Scheuerman v. Scheuerman (1916) 28 D.L.R. 223 (S.C.C.).

Schobelt v. Barber [1967] 1 O.R. 349.

Shabinsky v. Horwitz [1973] 1 O.R. 745 (Ont. H.C.).

Smarzik v. Bogdalik (1959) 29 W.W.R. 481 (Man. Q.B.).

Stewart v. Molybdenum Mining and Production Co. (1921) 60 D.L.R. 497 (B.C.C.A.).

Taylor v. Davies (1918) 41 D.L.R. 510, aff'd. (1920) 51 D.L.R. 75 (P.C.).

The King v. Caledonian Insurance Co. [1924] 2 D.L.R. 649 (S.C.C.).

Thompson v. Thompson [1961] S.C.R. 3.

Tombill Gold Mines Limited v. Hamilton (1956) 5 D.L.R. (2d) 561 (B.C.S.C.).

Wawanesa Mutual Insurance Co. v. Chalmers & Co. Ltd. (1969) 69 W.W.R. 612 (Sask. Q.B.).

Whonnock Lumber Co. Ltd. v. G. & F. Logging Co. (1968) 69 D.L.R. (2d) 561 (B.C.C.A.).

B. ENGLISH

Bannister v. Bannister [1948] 2 All E.R. 133 (C.A.).

Barnes v. Addy (1874) 9 Ch. App. 244.

Beswick v. Beswick [1968] A.C. 58.

Bevan v. Webb [1905] 1 Ch. 620.

Binions v. Evans [1972] Ch. 359 (C.A.).

Blackwell v. Blackwell [1929] A.C. 318 (H.L.).

Boardman v. Phipps [1967] 2 A.C. 46 (H.L.).

Booth v. Turle (1873) L.R. 16 Eq. 182.

Carl Zeiss Stiftung v. Herbert Smith (No. 2) [1969] 2 Ch. 276 (C.A.).

Cook v. Fountain (1676) 3 Swanston App. 585

Cleaver v. Mutual Reserve Fund Life Association [1892] 1 Q.B. 147.

Cooke v. Head [1972] 2 All E.R. 38 (C.A.).

Cowcher v. Cowcher [1972] 1 All E.R. 943.

Davies v. Otty (No. 2) (1865) 35 Beav. 208.

Davis v. Vale [1971] 2 All E.R. 1021 (C.A.).

Dawson v. Solomon (1859) 1 Dr. & Sm. 1.

Dillwyn v. Llewellyn (1862) D.G.F. & J. 517.

Dyer v. Dyer (1788) 2 Cox Eq. Cas. 92.

Ex Parte Dale & Co. (1879) 11 Ch. D. 772.

Ex Parte Grace (1799) 1 Bos. & V. 376.

Falconer v. Falconer [1970] 3 All E.R. 499 (C.A.).

Fribance v. Fribance [1957] 1 All E.R. 357 (C.A.).

Gissing v. Gissing [1971] A.C. 886 (H.L.).

Green v. Smith (1738) 1 Atk. 572.

Griffith v. Owen [1907] 1 Ch. 195.

Hamilton v. Wright (1842) 9 Cl. & Fin. 110.

Hargrave v. Newton [1971] 3 All E.R. 866.

Hazell v. Hazell [1972] 1 All E.R. 923.

Heseltine v. Heseltine [1971] 1 All E.R. 952 (C.A.).

Hillington Estates Co. v. Stonefield Estates Ltd. [1952] Ch. 627.

Holroyd v. Marshall (1862) 10 H.L.C. 191.

Howard v. Miller [1915] A.C. 318 (P.C.).

Hussey v. Palmer [1972] 1 W.L.R. 1286 (C.A.).

Karak Rubber Co. Ltd. v. Burden [1972] 1 W.L.R. 602 (Ch. D.).

Keech v. Sandford (1726) Sel. Cas. Ch. 61.

Lady Foliamb's Case (1651), cited in Davie v. Beversham (1661) Nel. 76.

Lee v. Sankey (1873) L.R. 15 Eq. 204.

Lister v. Stubbs (1890) 45 Ch. D. 1.

Lysaght v. Edwards (1876) 2 Ch. D. 499.

McCormick v. Grogan (1869) L.R. 4 H.L. 82.

Moses v. Macferlan (1760) 2 Burr. 1005, 1 Wn. Bl. 219.

National Provincial Bank Ltd. v. Ainsworth [1965] A.C. 1175 (H.L.).

Neale v. Willis (1968) 19 P. & C.R. 836 (C.A.).

Nelson v. Larholt [1948] 1 K.B. 339.

Ottaway v. Norman [1972] 2 W.L.R. 50.

Parker v. McKenna (1874) L.R. 10 Ch. 96.

Pettitt v. Pettitt [1970] A.C. 777 (H.L.).

Phipps v. Boardman [1964] 2 All E.R. 187, aff'd. [1967] 2 A.C. 46 (H.L.).

Pilcher v. Rawlins (1872) 7 Ch. App. 259.

Port Line Ltd. v. Ben Line Steamers Ltd. [1958] 2 Q.B. 146.

Protheroe v. Protheroe [1968] 1 W.L.R. 519 (C.A.).

Randall v. Russell (1817) 3 Mer. 190.

Rayner v. Preston (1881) 18 Ch. D. 1.

Re Barney [1892] 2 Ch. 265.

Re Biss [1903] 2 Ch. 40.

Re Boyes (1884) 26 Ch. D. 531.

Re Coomber: Coomber v. Coomber [1911] 1 Ch. 723.

Re Crippen [1911] P. 108.

Re Cummins [1971] 3 All E.R. 782.

Re Diplock [1948] Ch. 465 (C.A.).

Re Duke of Marlborough [1894] 2 Ch. 133.

Re Green [1951] Ch. 148.

Re Jon Beauforte (Lonton) Ltd. [1953] Ch. 131.

Re Rees [1950] Ch. 204.

Re Solomon [1967] Ch. 573.

Re Young [1951] Ch. 344.

Regal (Hastings) Ltd. v. Gulliver [1942] 1 All E.R. 378 (H.L.).

Rimmer v. Rimmer [1953] 1 Q.B. 63.

Rochefoucauld v. Boustead [1897] 1 Ch. 196.

Roman v. Crichton (1968) 67 D.L.R. (2d) 669, aff'd. (1969) 3 D.L.R. (3d) 673 (S.C.C.).

Selangor United Rubber Estates Ltd. v. Cradock (No. 3) [1968] 2 All E.R. 1073.

Shaw v. Foster (1872) L.R. 5 H.L. 321.

Sinclair v. Brougham [1914] A.C. 398 (H.L.).

Solle v. Butcher [1950] 1 K.B. 671 (C.A.).

Vandervell v. Inland Revenue Commissioners [1967] 2 A.C. 291 (H.L.).

Wall v. Bright (1820) 1 Jac. & W. 494.

Wallgrave v. Tebbs (1855) 2 K.J. 313.

White v. Nutts (1702) 1 P. W. 61.

C. AMERICAN

Beatty v. Guggenheim Exploration Co. (1919) 225 N.Y. 380.

Re Berry (1906) 147 Fed. 208 (C.C.A. 2d).

APPENDIX 2

STATUTES CITED

Statute of Frauds 29 Car. II, c. 3.

Wills Act, R.S.A. 1970, c. 393.